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No. 391.

Brief of Seligman Frank & Edward Frank
Appellees.

Filed Jan. 18, 1901

Supreme Court of the United States.

October Term, A. D. 1900.

No. 391.

In the matter of AUGUST FRANK, JOSEPH FRANK and LOUIS FRANK, trading as FRANK BROTHERS, Bankrupts.

JOHN T. PIRIE, SHERMAN SCOTT, GEORGE SCOTT, ANDREW McLENNAN, SAMUEL H. PIRIE, JOHN H. SCOTT and JAMES GRANGE, Co-partners trading as GARDNER, PIRIE, SCOTT & COMPANY,

Appellants,

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee,

Appellee.

Brief and Argument on Behalf of Appellee.

ELI B. KELSENTHAL,
SELIGMAN FRANK,
Counsel for Appellee.

Rogers & Co., Printers, Chicago.

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JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISCH, SAMUEL C. PIRIE, JOHN E. SCOTT and JAMES GRASSIE, Co-partners trading as CARSON, PIRIE, SCOTT & COMPANY,

Appellants,

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee,

Appellee.

Brief and Argument on Behalf of Appellee.

STATEMENT OF THE CASE.

We desire to supplement appellant's statement of facts by calling the court's attention to the following matter appearing in the record:

On March 17, 1899, appellants filed with Frank L. Wean, Referee, to whom was referred the matter of Frank Brothers, bankrupts, a proof of debt amounting to $3,093.98, being a balance of an account for goods theretofore sold and delivered by appellants to said Frank Brothers. This claim was allowed on the

same day. (Rec., 13.) On May 19, 1900, after a dividend had been declared and appellants had received their dividends, appellee, who had been duly appointed trustee of said bankrupt estate, filed with said referee a petition praying that appellants' claim should be reconsidered and rejected in whole upon the grounds that appellants had within four months prior to the filing of the petition in bankruptcy received from the bankrupts large preferences, which preferences appellants have not surrendered, and appellee further prayed in said petition that it, as such trustee, recover from the appellants the amount of the dividends theretofore received by said appellants. To this petition appellants filed their answer, admitting that they collected in the ordinary course of business from the bankrupts within four months prior to the filing of the petition in bankruptcy the sum of $1,036.79, and alleging that appellants did not know or have reason to believe that said bankrupts were insolvent at the time the payments were made, and that they did not have reasonable cause to believe that such payment was made with any intent to give the preferences.

The Referee to whom the cause was referred found the following facts:

That the bankrupts were duly adjudicated bankrupts on the 11th day of February, 1899.

Second. That for a long time prior thereto appellants had carried on dealings with the bankrupt firm, said dealings consisting of the sale of goods, wares and merchandise by appellants to the bankrupts, the total amount of said sale being $4,403.77.

Third. That appellants in the regular and ordinary course of business and within four months prior to the adjudication in bankruptcy collected and received from bankrupts in partial payment of said account for said goods,

wares and merchandise the sum of $1,036.79, leaving a balance due, owing and unpaid of $3,093.98.

Fourth. That at the time these payments were made said bankrupts were wholly and hopelessly insolvent to their own knowledge, and from that time and up to the date of the adjudication in bankruptcy, the assets of the brankrupts did not exceed the sum of $125,000, while their liabilities exceeded $500,000.

Fifth. That at the time of these payments neither appellants nor their agents had knowledge of the insolvency of said bankrupts or had reasonable cause to believe that said bankrupts were insolvent, and that when said payments were made said appellants did not have reasonable cause to believe that said bankrupts by said payments thereby intended to give a preference.

That at or about the time of the first meeting of the creditors, to-wit, March 14, 1899, appellants filed their claim against the bankrupt estate for their said balance, to-wit, $3,093.98, which claim was duly allowed.

That thereafter and on the 28th day of April, 1899, a dividend of 15 per cent. upon all claims which were allowed against the bankrupt estate was duly declared by the referee, which dividend was paid to the various creditors who had proved their claims, including appellants; that the amount of the dividend paid to appellants was $464.10, which appellants still retain, no part thereof having been repaid to the trustee.

That at the time of the allowance of said claim and the declaration of said dividend appellee was not aware that appellants had received any preference on their claim and demand against said bankrupts.

That appellants had refused to surrender to the trustee the

amount of the payments made to them by the bankrupts as a condition of the allowance of their claim, and have by their counsel declared that it is the intention of appellants to retain the full amount of said payments so made by said bankrupts and not to surrender the same.

The referee further reported that at the hearing it was expressly stated that the questions to be passed upon were:

First. Whether payments made to creditors by bankrupts within four months prior to their adjudication in bankruptcy, which said payments were made in the regular and ordinary course of business, constitute preferences, whether the creditors receiving such payments were aware of the insolvency of said bankrupts or not, or had reasonable cause to believe that by reason of such payments a preference was intended.

Second. Whether in the proceeding for the reconsideration and rejection of the claim the bankrupt court had the power and authority to order, require and compel said appellants to repay to appellee the amount of the dividend received by them after their claim had been rejected.

The referee further reported that by reason of such payments made by bankrupts to appellants within four months prior to the adjudication in bankruptcy said bankrupts gave a preference to appellants and appellants did receive a preference from said bankrupts in that said bankrupts did within said time make a transfer to said appellants, and the effect of said transfer was that said appellants did obtain a greater percentage of the debt due to them from the bankrupts than other creditors of said bankrupts of the same class.

The Referee therefore made the following order:

First. That appellants' claim theretofore filed and allowed should be reconsidered.

Second. That appellants' claim should be rejected and expunged.

Third. That the bankruptcy court in the proceeding brought to reconsider and reject said claim has the power and authority to order, require and compel appellants to repay to appellee the amount of dividend received by them.

Fourth. That appellants shall pay to appellee the amount of said dividend, to wit, the sum of $464.10. (Rec., 10-13.)

This report and order of the referee was confirmed by Honorable C. C. Kohlsaat, Judge of the District Court, on May 9, 1900, and on the same day appellants prayed an appeal to the United States Circuit Court of Appeals for the Seventh Judicial Circuit from this order and decree. (Rec., 18, 19 and 20.)

The United States Circuit Court of Appeals for the Seventh Judicial Circuit on June 22, 1900, entered an order affirming the said order and decree (Rec., 35, 36), and pursuant to the requirements of Subdivision 33, Rule 36 of the general orders in bankruptcy, made and filed findings of fact and conclusions of law thereon, which findings of fact and conclusions of law are in all respects similar to those made and found by the referee. (Rec., 33, 34, 35.)

There are thus presented on this appeal two questions to be decided:

1. Whether payments made to creditors by bankrupts within four months prior to their adjudication in bankruptcy, which said payments were made in the regular and ordinary course of business, constitute preferences, whether the creditors receiving such payments were aware of the insolvency of said bankrupts or not, or had reasonable cause to believe that by reason of such payments a preference was intended.

B. Did the District Court in the proceedings brought for reconsideration and rejection of appellants' claim have the power and authority to order, require and compel appellants to repay to appellee the amount of the dividend received by them.

The opinion of the court below is as follows:

"*Per Curiam.* It is agreed by counsel that the questions "presented upon the record are identical with that decided "by this court in *Columbus Electric Co.* v. *Warden, Trustee,* "*in re* Fort Wayne Electric Corporation, 99 Fed., 400.

"The order below is therefore affirmed."

The decision referred to in the opinion of the learned court below is printed in full in the appendix to this brief.

BRIEF.

I.

A creditor who has received payments on account within four months prior to the adjudication in bankruptcy cannot have his claim allowed without first surrendering such payments. Such payments constitute preferences under Sections 57*g* and 60*a*, although they were received in due course of business, in good faith, and without intent on the part of either the creditor or debtor or knowledge on the part of the creditor that a preference was intended by such payment.

Columbus Electric Company v. *Worden, Trustee, in re* Fort Wayne Electric Corporation (U. S. Circuit Court of Appeals, 7th Circuit), 99 Fed. Rep., 400.

In re Fixen (U. S. Circuit Court of Appeals, 9th Circuit), 102 Fed. Rep., 295.

In re Jones, 4 A. B. R., 563.

In re Teslow, 104 Fed. Rep., 229.

In re Arndt, 104 Fed. Rep., 234.

In re Gillette, 104 Fed. Rep., 770.

In re Schmerschel Cloak & Suit Co., 104 Fed. Rep., 64.

In re Conhaim, 97 Fed. Rep., 923.

In re Sloan, 102 Fed. Rep., 116.

In re Rogers Milling Co., 102 Fed. Rep., 687.

In re Christensen, 101 Rep., 224.

In re Strobel & Wilken Co. v. *Knost*, 99 Fed. Rep., 409.

In re Beswick, 2 N. B. N., 808.

In re Thompson, 2 N. B. N., 1016.

In re Jourdan, 2 N. B. N., 581.

In re Wise, 2 N. B. N., 157.

In re Ryan, 2 N. B. N., 693.
In re Siegel-Hillman Co., 2 N. B. N., 933.
In re Flick, 3 N. B. N., 71.
Loveland on Bankruptcy, 257.
Collier on Bankruptcy, 285-286.
Brandeburg on Bankruptcy, 296.
Lowell on Bankruptcy, 43.

II.

The bankruptcy court has the power in proceedings brought to reconsider and reject claims which have been allowed and upon which dividends have been paid, to require the creditor whose claim has been so reconsidered and rejected and who has received a dividend, to repay such dividend to the trustee.

Bankrupt Act of 1898, Section 57, Subdivisions 2, *d, f, k, l* and *n*. Section 2 (2), (7), (15).
Ex parte Bolten *et al.*, 1 Deacon & Chitty's Rep., 556.

ARGUMENT.

I.

First.

INTERPRETATION OF SECTIONS 57*g* AND 60*a* OF THE BANKRUPT ACT.

The principal question presented on this appeal is correctly put in appellants' brief. It is whether under the present Bankrupt Act payments made to a creditor by an insolvent within four months prior to the adjudication in bankruptcy, in the ordinary course of business constitute preferences, whether the creditor receiving such payment was at the time aware of the insolvency of such bankrupt or not, or had reasonable cause to believe that by reason of such payment a preference was intended.

This question was definitely raised, and answered in the affirmative by the Circuit Court of Appeals for the Seventh Circuit *in re* Worden, 99 Fed. Rep., 400; by the Circuit Court of Appeals for the Ninth Circuit *in re* Fixen, 102 Fed., 295, by at least ten district Judges and by as many Referees.

There is a remarkable unanimity of opinion on this question in all of the courts below, despite the fact that appellants upon their application to have this cause advanced claimed that there was a vast diversity of opinion. We have been able to find among the reported cases only three holding to the contrary, to-wit, *in re* Piper, 2 N. B. N., 7; *in re* Smoke, 2 N. B. N., 831; *in re* Hall, 2 N. B. N., 1126.

The first of the cases above cited, *in re* Piper, having been decided by a Judge of the California District Court, was

virtually overruled by its appellate tribunal, the United States Circuit Court of Appeals for the Ninth Circuit, which decided the *Fixen* case. This leaves but two cases as against the vast array of decisions and authorities cited in the foregoing brief. Both of these cases are decisions of referees.

It is true that the decision of Referee Wise *in re* Smoke, *supra*, was affirmed by Judge Brown of the Southern District of New York, 104 Fed. Rep., 289, but a reference to the opinion of the learned Judge will show that he affirmed the decision of the referee solely upon the ground that no proof was offered to show at the time of the making of the alleged preferential payments the bankrupt was insolvent. The court wholly ignored the question argued by the referee and presented on this appeal.

The following is the opinion of Judge BROWN *in re* Smoke:

"In my judgment Sections 57*g* and 60*a* have no reference "to payments made on account of debts in the regular course "of business *by one* who, as in this case, *does not know or "believe himself at the time to be insolvent* and who intends "no preference by such payment, even though it should af- "terwards appear that the debtor was at the time insolvent, "and the payment was within four months of the commence- "ment of bankruptcy proceedings. The above sections (*g* "and *a*) contain no time limit. The phrase 'transfer of "property' in Section 60*a* is not intended to cover such a "mere payment of money in good faith, and in the ordinary "course of business *by one believing himself solvent*. Such "a payment I think is not a preference.

"Above ruling affirmed ON THIS GROUND."

The fact that Judge Brown affirmed the decision of Referee Wise only upon the ground that it had not been made to appear that the bankrupt was insolvent at the time the alleged preferential payments were made is proof conclusive

that he did not agree with the Referee on his opinion that Sections 57*g* and 60*a* should receive the construction contended by appellants.

The remaining decision against the prevailing opinions, *Re Hall,* was written by Referee Hotchkiss. The opinion of this Referee is in the face of the decisions of all previously reported cases, including a very lengthy and analytical opinion of the learned Referee himself. *In re Aaron Meyers* (1 A. B. R., 1; S. C., 1 U. B. N., 208), Mr. Hotchkiss refers to the marked differences in phraseology between terms used in corresponding provisions of the Bankrupt Act of 1867 and the present act, and he argues therefrom Congress intended thereby a change of meaning. He says among other things that the present law looks to the effect, rather than the intent, in creating a preference. We shall refer to this diversity of opinion of the same Referee, in a subsequent part of our brief. There is practically, therefore, no decision worthy of serious consideration by this court of any of the courts below or of any Referee, which militates against the theory entertained by the court below.

Although the numerous authorities cited in our brief sustain the construction given by the court below to the sections of the Bankruptcy Act under consideration, a perusal of the opinions expressed by the Judges will show that they arrived at their decisions not on account of the opinion of the Circuit Court of Appeals in the *Worden* case, and not in blind obedience thereto, but for the reason that that construction met with their fullest approval.

It would certainly seem clear that the decisions of these various eminent authorities, and the conclusions and opinions of so many Circuit Court Judges, District Court Judges and Referees ought to firmly establish an ordinary legal proposition, and a court should hesitate long before attempting to overthrow such a strong array of judicial approval

and decisions. It was our intention at the outset to answer appellants' brief fully and at length and to meet one by one the arguments advanced by them, but upon a perusal of the published reports of the cases in the courts below holding that payments made under the circumstances referred to constitute preferences, we find that almost all the points advanced by appellants are so fully and ably discussed and the various phases of the questions presented have been so extensively treated by these various courts, Judges and Referees, that it would seem to be a work of supererogation to go over the entire ground and to argue in detail the various theories upon the proposition *pro* and *con*. A reading of these reported cases will satisfy this court that the identical arguments adduced by appellants have been used and presented to the other courts. For instance, the opinion of the Circuit Court of Appeals in the *Fixen* case will demonstrate that a substantial portion of the brief presented to this court had been submitted and read to that court.

The *amicus curiae* referred to in the report of the *Fixen* case is one of the counsel for appellants in this case, and a resort to the opinion in the *Fixen* case will show how that court regarded and disposed of his theories. In view, therefore, of the full and exhaustive treatment which the case presented herein has received at the hands of all the courts below, and in the belief that no better or more comprehensive briefs could be presented by us on this appeal than a collation of some of these cases, we have incorporated in an APPENDIX to this brief the full reports of the opinions in the following cases:

Columbus Electric Co. v. *Worden*, 99 Fed. Rep., 400.

In re Fixen, 102 Fed. Rep., 295.

In re Conhaim, 97 Fed. Rep., 923.
In re Wise, 2 N. B. N., 157.

The arguments of appellants' counsel being fully and completely met in the opinions contained in the cases printed in the appendix, we deem it unnecessary to attempt to controvert every one of the arguments or theories advanced in appellants' brief. There are some few points, however, in addition to what have already been raised and discussed in the cases in the appendix, to which we desire to call the court's attention, and we therefore do, as briefly as possible in the following pages, set forth our views in regard to those points.

I.

THE PHRASEOLOGY OF THE PROVISIONS OF THE BANKRUPTCY ACT IS PLAIN AND UNAMBIGUOUS—IT LEAVES NO ROOM FOR JUDICIAL CONSTRUCTION.

Section 57*g* of the act is as follows: "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Section 60*a* reads: "A person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 60*b* reads: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the ad-

"judication, and the person receiving it, or to be benefited "thereby, or his agent acting therein, shall have had reason- "able cause to believe that it was intended thereby to give "a preference, it shall be voidable by the trustee, and he "may recover the property or its value from such person."

These sections are clear and unambiguous. By the first clause above cited Congress has declared that any creditor who has received a preference shall not be allowed to share in the distribution of the bankrupt's estate unless he shall surrender the preference.

Section 60*a* has the only definition of a preference contained in the act, and no other clause purports in any way to modify this definition. By this definition a preference is not made to depend neither upon the intent of the insolvent or upon the knowledge or belief of the creditor that a preference was intended. The transfer whether by way of payment or otherwise, the effect of which will be to enable any one of the creditors to obtain a greater percentage of his debt than other creditors in the same class, constitutes a preference. Effect alone is the dominant factor in determining whether a preference has been created or not. That a payment is a transfer within the purview of the act cannot be gainsaid. The definition of the ward "transfer" is given in Section 1 (25) as follows: "'Transfer' shall include "the sale and every other and different mode of disposing "of or parting with property, or the possession of property, "absolutely or conditionally, as a *payment*, pledge, mort- "gage, gift or security." That a transfer of money, in other words a payment, is a transfer of property, thus plainly appears. It is taxing credulity to the utmost to argue that Congress meant to interdict all preferential transfers of property, except money, and permit all payments of money no matter how fraudulent or preferential.

The language of these sections is susceptible of but one meaning. The intention of Congress as thereby expressed is clear, unequivocal and unambiguous. It would be difficult to employ language more plainly signifying that intent on the part of the debtor or knowledge on the part of the creditor is not an essential ingredient of a preference. The sole question is, does the payment have the *effect* of giving the payee a greater percentage of the insolvent's assets than other creditors of the same class. If this effect is produced, it is a preference, and the creditor will not be allowed to use the machinery of the bankruptcy court to obtain a dividend out of the bankrupt's estate, in addition. Section 60*b*, however, adds other and different circumstances to be proved to entitle one to the relief provided therein. It adds the increment of knowledge on the part of a creditor receiving a preference, that a preference was intended, as a condition precedent to a recovery by the trustee of the value of the preference. It makes a preference, received *with knowledge*, by the payee, that a preference is intended, recoverable by the trustee. There being not the slightest ambiguity it will not be necessary to resort to the rules of construction, for, as recently declared by this court, "the province of construction lies wholly within the domain of ambiguity." (*Hamilton* v. *Rathbone*, 175 U. S., 416-421.)

In all cases it must be assumed that words and phrases are used in their popular and common acceptation, and from this presumption it is not allowed to depart unless it clearly appears that such interpretation does not give the real intention of the legislature. Appellants urge with great earnestness that a literal reading of the above sections and the meaning given them by the numerous authorities lead to absurd results. This we strenuously deny. But, assuming, for ar-

gument's sake, that absurd results flow from a literal reading of the law, it by no means follows that the court in passing upon the law would have the power to disregard the plain, unambiguous wording of the act under consideration. Any departure from the undoubted interpretation of plain and unmistakable words would be an unjustifiable assumption of legislative power. When the language of an act is susceptible of but one meaning it must receive that meaning although such construction might lead to results which are absurd or mischievous. Courts are not to tamper with the clear and unequivocal meaning of the words, although the consequences may be such as were not contemplated by the legislature. There can be no departure from the plain meaning of a statute on grounds of unwisdom or of public policy.

Sedgwick on Statutes, 231.
Cooley on Const. Limitation (5th Ed.), 197.
U. S. v. *Fisher,* 2 Cranch., 399.
St. Paul Ry. Co. v. *Phelps,* 137 U. S., 528.

When the law is clear the judges should determine as the law is without regard to inequitableness. In the words of Lord BACON: "Judges ought to remember that their "office is *jus dicere* not *jus dare,* to interpret law, not to "make law."

If the meaning of the act is plain, it must be obeyed, even if great inconvenience might result from construction in conformity with the meaning.

U. S. v. *Fisher,* 2 Cranch., 385.

We agree with appellants that all laws should receive a sensible construction, and that the general treatment of a statute should be so limited in its application as not to lead to oppression, injustice or absurd consequences. It will, however, always be presumed that the legislature intended

exceptions to language which would avoid absurdities of this nature; moreover, the absurdity must be of such a *degree* that the action of the court in sanctioning an interpretation leading to absurd consequences must be stultifying. What this degree of absurdity is has been plainly expressed by this court in the following language of Chief Justice MARSHALL: "Before discussing this argument, it may not be improper "to premise that, although the spirit of an instrument, es- "pecially of a constitution, is to be respected not less than "its letter, yet the spirit is to be collected chiefly from its "words. It would be dangerous in the extreme to infer "from extrinsic circumstances that a case for which the "words of an instrument expressly provides shall be ex- "empted from its operation. Where words conflict with "each other, where the different clauses of an instrument "bear upon each other, and would be inconsistent unless the "natural and common import of words be varied, construc- "tion becomes necessary, and a departure from the obvious "meaning of words is justifiable. But if, in any case, the "plain meaning of a provision, not contradicted by any other "provision in the same instrument, is to be disregarded, be- "cause we believe the framers of that instrument could not "intend what they say, it must be one in which the absurdity "and injustice of applying the provisions of the case would "be so monstrous that all mankind would, without hesita- "tion, unite in rejecting the application."

Sturges v. *Crowninshield*, 4 Wheaton, 203.

"By the term 'absurdity' is meant that which is to be re- "garded as morally impossible; which is contrary to reason, "or in other words which could not be attributed to men in "their right senses."

Patten v. *Douglas Co.*, 87 Mo., 239.

This court has at various times given instances in which it will overlook the literal meaning of the terms of a statute although unambiguous, where such literal interpretation would lead to absurd and wholly unlooked for results. The leading case is *U. S.* v. *Kirby*, 7 Wallace, 482, in which this court passed upon an act of Congress which imposes a penalty upon any person who knowingly and willfully obstructs and retards the passage of the mail or its carrier.

Kirby and others were indicted for knowingly and willfully obstructing and retarding the passage of the mail and of the mail carrier. It appeared that one Farris, a mail carrier, was indicted for murder and that by order of the court, bench warrants were issued upon the indictment and placed in the hands of Kirby, who was then Sheriff, commanding him to arrest Farris and bring him before the court to answer the indictment; that under these warrants he arrested Farris; that Kirby and others entered a steamboat on which Farris was at that time a passenger and in charge of certain mail then in process of transportation, and the question under consideration by this court was whether Kirby had thereby violated the statute above referred to. The court held that to read the statute so as to make Kirby guilty of violating the same would lead to absurd results and that the legislature intended exceptions to its language which would avoid results of this character, and that the reason of the law in such a case should prevail over its letter. The court, among other things, says: "The common sense "of man approves the judgment mentioned by Puffendorf, "that the Bolognian law which enacted, 'that whoever drew "blood in the streets should be punished with the utmost "severity' did not extend to the surgeon who opens a vein "of a person that fell down in the street in a fit. The

"same common sense accepts the ruling, cited by Plowden, "that the statute of 1st Edw., II., which enacts that a prison- "er who breaks prison shall be guilty of felony, does not "extend to a prisoner who breaks out when the prison is on "fire—'for he is not to be hanged because he would not "stay to be burned.' And we think that a like common "sense will sanction the ruling we make, that the act of "Congress which punishes the obstruction or retarding of "the passage of the mail, or of its carrier, does not apply "to a case of temporary detention of the mail caused by the "arrest of the carrier upon an indictment for murder."

This case and the illustrations therein, tend to show the degree of absurdity which should warrant a court in disregarding the letter of the law and looking rather to its intent.

The cases of absurd results following a literal reading of statutes incorporated in appellant's brief are of this character. They do not apply to the case at bar.

From the rule that, where but one meaning can attach to the terms of a statute, there is no room for construction, it follows, that nothing can be added to or taken from the statute, unless to construe its words according to the obvious meaning would give rise to manifest inconsistency, incongruity or ambiguity. A court may insert limitations only as to special cases which fall within the scope of the general terms used in the statute.

U. S. v. *Coombs,* 12 Peters. U. S., 72.
Ogden v. *Strong,* 2 Payne U. S., 584.
McIver v. *Regan,* 2 Wheaton, 95.
Lake Co. v. *Rollins,* 130 U. S., 662.

Words may not be imported into a statute in order that it may include a case which has been omitted, merely because

there seems to be no good reason why it should be omitted and the omission seems to have been merely unintentional.

Dwarris Stat., 2d Ed., 579.

It is therefore only in cases where the words of a statute are capable of two meanings, or where, by giving them their literal interpretation the statute will be inconsistent or ambiguous, that the courts resort to the secondary rules of construction to aid in determining the real meaning of the legislature.

Denn v. *Reid,* 10 Peters, 524.

Priestman v. *U. S.,* 4 Dallas, 30.

Confining ourselves to the " four corners " of the act, the correctness of the construction placed by all the courts below upon the sections involved in this appeal will be made more apparent, and reference to other sections of the present bankruptcy act will give this court some assistance in determining the real meaning of the sections of the act at present under consideration. Section 3 reads as follows:

" Acts of Bankruptcy."

(*a*) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or, (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or, (4) made a general assignment for the

benefit of his creditors; or, (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

Section 65*d* provides: "Wherever a person shall have "been adjudged a bankrupt by a court without the United "States and also by a court of bankruptcy, creditors resid- "ing within the United States shall first be paid a dividend "equal to that received in the court without the United "States by other creditors, before creditors who have re- "ceived a dividend in such court shall be paid any amounts."

Section 65*e*. "A claimant shall not be entitled to col- "lect from a bankrupt estate any greater amount than shall "accrue pursuant to the provisions of this act."

67*f* provides: "That all levies, judgments, attachments "or other liens obtained through legal proceedings against "the person who is insolvent, at any time within four months "prior to the filing of a petition in bankruptcy against him, "shall be deemed null and void in case he is adjudged a "bankrupt, and the property affected by the levy, judgment, "attachment or other lien shall be deemed wholly discharged "and released from the same, and shall pass to the trustee "as a part of the estate of the bankrupt, unless the court "shall, on due notice, order that the right under such levy, "judgment, attachment or other lien shall be preserved for "the benefit of the estate; and thereupon the same may pass "to and shall be preserved by the trustee for the benefit of "the estate as aforesaid. And the court may order such "conveyance as shall be necessary to carry the purposes of "this section into effect: Provided, that nothing herein "contained shall have the effect to destroy or impair the title "obtained by such levy, judgment, attachment or other lien, "of a *bona fide* purchaser for value who shall have acquired "the same without notice or reasonable cause for inquiry."

It is most significant that Section 3, defining *acts of bankruptcy*, makes intent on the part of the debtor a necessary element. The present act, as well as prior bankruptcy acts, provides for two classes of bankrupts, voluntary and involuntary. In case of voluntary bankruptcy the aid of the law is invoked by the bankrupt himself with the purpose of being discharged from his debts as the principal motive; and of the other, the movement is made by his creditors for the purpose of securing the appropriation of his property to their payment, discharge being with them a matter of no weight, and often contested.

Wilson v. *City Bank*, 17 Wallace, 473-81.

"The reason for this wide difference in the proceedings "in the two cases is obvious enough. When a man is willing to refer his embarrassed condition to the proper courts "with a full surrender of his property, no harm can come "to any one but himself, and there can be no solid objection "to the course he pursues; but when a person wants to take "from another the control of his property, to arrest him in "the exercise of his occupation and to impair his standing "as a business man—in short, to place him in a position "which may ruin him in the midst of a prosperous career, "the precise circumstances or facts in which he is authorized to do this should not only be well defined by the law, "but clearly established in the court."

Wilson v. *Bank*, *supra*.

In other words, a person may be forced into involuntary bankruptcy on account of the *wilfull* acts performed by him, and for the reason that he *intended* to commit an act which would render him amenable to the stringent provisions of the bankruptcy act, he may be punished by being thrown into involuntary bankruptcy. Section 3 refers to *involuntary*

cases, and, therefore, it very justly makes *intent* a necessary element in the various causes which constitute acts of bankruptcy, but when once a person has been adjudicated a bankrupt, either on his own petition in voluntary proceedings, or as the result of involuntary proceedings, the great cardinal purpose of the bankruptcy act, to-wit, the ratable and equitable distribution of the bankrupt's assets among all his creditors, must be held in view and that purpose must be carried out without regard to intent.

Sections 57*g* and 60*a* of the act apply to cases of both voluntary and the involuntary bankruptcy. They have reference merely to the mode of distribution of the bankrupt's estate, and designate the persons entitled to share in such distribution. Intent plays no part in this distribution, as has been clearly shown in the reported cases to which we have referred. In arriving at a determination of the persons entitled to share in the distribution of the bankrupt's estate, and in considering what are the effects of payments or transfers claimed to be preferences, *intent* has been wholly eliminated, and the *effect* merely of transfer or payment is the only matter to be taken into consideration.

Preferences are thus treated by the present bankruptcy act under three conditions definitely distinguished. First, under 3*a* (2), as *an act of bankruptcy*, intent to give a preference must exist, and properly so, for no man should be punished by being compelled to surrender dominion of his property which the common law vouchsafes to him unless he has committed an act willfully.

Secondly, 57*g*, determines the mode of distribution of the bankrupt's assets, and the persons among whom this distribution should take place, and intent is not necessary,

for the effect of a preference is the only thing which ought to be regarded, it therefore very naturally disassociates the idea of intent from that of preference.

Thirdly, 60*b* provides no creditor should be compelled to surrender that which he has received in good faith unless knowledge or intent that a preference was intended should be found to exist. The effect of the interpretations placed upon these provisions of the act by all of the courts below so far from being absurd or mischievous in results, are, in our opinion, most consonant with equity and fair dealing. The three distinctions above pointed out stand out in clear and bold relief. Under their terms it is necessary to show that the debtor intended to give a preference, but it is not necessary to show that a creditor has reasonable cause to believe it was so intended. Again, a preferential transfer may be sufficient to make the transferor a bankrupt, although not of such a character that the trustee may recover it back.

Re Drummond, Fed. Cases, 4093.

Re Oregon, Bull & Prent. Co., 13 N. B. R., 503-514.

Loveland on Bankruptcy, Sec. 52.

So far as Section 60*a* is concerned, the intent of the debtor, and the knowledge of the creditor, are alike immaterial. If the bankrupt is insolvent, then any payment made by him whether in the ordinary course of business, or otherwise, on account of his indebtedness, must operate to enable the payee to obtain a greater percentage of his debt than others of the same class, on account of whose indebtedness nothing has been paid. Whether such payment has been made in the usual course of business or not is immaterial so far as Section 60*a* is concerned, because it can only bear on the question of intent and knowledge of the

parties; and the question of knowledge and intent are, as we claim, wholly immaterial, except under Section 3*a* (2) and 60*b*.

There can exist no doubt or misgiving as to the meaning and plain applicability of these subdivisions. No necessity exists for reading into these sections any additional words or for ascribing to them a meaning which the words do not import. Appellants are endeavoring in this appeal to have this court interpolate into Section 57*g* an additional phrase, so as to make this section read: "The claims of creditors who "have received preferences *voidable under Section 60b* "shall not be allowed, etc." It is fair to assume that if Congress had intended to exclude only preferences received with knowledge it would have so worded that section.

A recapitulation of all of the sections above quoted would make the act read as follows:

1. Section 3*a* (2) says to the *debtor*, "if you have will- "fully and *with intent* committed an act the effect whereof "would be to give a preference to one of your creditors, "you have committed an act of bankruptcy, the penalty of "which is your liability to be thrown into involuntary bank- "ruptcy."

2. Section 57*g* says to the *creditor*, "you may prove "your claim against the estate if you have not received a "preference and if you have received a preference you may "prove your claim on condition that you surrender the pre- "ference."

3. Section 60*a* says to the *debtor and creditor*, "if the "*effect* of a transfer or payment by the insolvent debtor is "that one creditor has received a greater percentage than "other creditors of the same class, such transfer or pay- "ment shall be a preference."

4. Section 60*b* says to the *creditor,* "if you "received a preference within four months before the filing "of the petition in bankruptcy, and you have reasonable "cause to believe that a preference was intended, the trus- "tee of the bankrupt's estate may compel you to return the "value of the preference."

5. Section 65*d* says to the creditor, "if you have re- "ceived from the estate of the bankrupt, administered out- "side of the United States, any dividend on your claim, you "shall not participate in the bankrupt's estate until all cred- "itors residing in the United States have received a like "dividend on their claims."

6. Section 65*e* says to the creditor, "you shall not col- "lect from the bankrupt estate any greater amount than "would accrue to you pursuant to the provisions of the bank- "rupt act.'

7. Section 67*f* says to the creditor, "if you have obtained "a lien through judicial proceedings against a bankrupt "at any time within four months prior to the filing of the "petition against him, such lien is a nullity and will be "either disregarded or set aside by the court."

The foregoing recapitulation we have taken from a brief in a case involving the same question presented to the Circuit Court of Appeals by eminent St. Louis attorneys.

In but two of the clauses above set forth does the act provide for the necessity of the intent or knowledge, 1 and 4. In the other cases there is no necessity of proving either intent or knowledge. In the light of the provisions above set forth, can it be said, either that ambiguity exists or that the interpretation arrived at will lead to absurd results. We close this branch of the discussion with a citation from the language of Mr. Justice BREWER: "The primary

"and general rule of statutory construction is that the in-
"tent of the law-maker is to be found in the language that
"he has used. He is presumed to know the meaning of
"words and the rules of grammar. The courts have no
"function of legislation and simply seek to ascertain the
"will of the legislature. It is true that there are cases in
"which the letter of the statute is not deemed controlling,
"*but the cases are few and exceptional*, and only arise when
"there are cogent reasons for believing that the letter does
"not fully and accurately disclose the intent. No mere
"omission, no mere failure to provide for contingencies,
"which it may seem wise to have specifically provided for,
"justify any judicial addition to the language of the statute.
"In the case at bar the omission to make specific provision
"for the time of payment does not offend the moral sense.
"* * * Certainly there is nothing which imperatively
"requires the court to supply an omission in the statute,
"or to hold that Congress must have intended to do that
"which it failed to do."

U. S. v. *Goldenberg*, 168 U. S., 95-103.

II.

THE RULES OF CONSTRUCTION FAVOR THE INTERPRETATION ADOPTED BY THE COURT BELOW.

But if this court should be of the opinion that the sections of the act in question are not unambiguous, or that a literal interpretation leads to absurd and mischievous results, and in consequence thereof resort must be had to the rules of interpretation and construction, we find ourselves confronted by the following canons of construction.

First. In arriving at the intent of the law-makers statutes in *pari materia* may be referred to.

Second. The legislative purpose and object aimed at ought to be borne in mind, and language susceptible of more than one construction is to receive that which will bring it into harmony with such object and purpose rather than that which will tend to defeat them.

Third. Courts in construing a statute may with propriety regard the history of the times when it was passed and the general state of opinion, public, judicial and legislative, at the time of the enactment.

One of the chief canons of interpretation and construction of statutes is that referring to the intent of the legislative body in enacting the statute. Statutes in *pari materia* may be referred to on the question of intent. Not only may be contemporaneous and prior statutes be considered in construing a given act, but a subsequent statute may often aid in the interpretation of a prior one. Expired and repealed acts in *pari materia* with the statute to be construed may also be considered in the interpretation thereof.

"All acts in *pari materia*" says Lord Mansfield, "are to "be taken together as if they were one law. Where there "are different statutes in *pari materia*, though made at dif- "ferent times or even expired and not referring to each other, "they shall be taken and construed together as one system "and as explanatory of each other."

Sedgwick Stat. Law, 247.

"The rule that statutes in *pari materia* are to be con- "sulted for the construction of each other holds good, though "some of the statutes may have expired or even been re- "pealed, and whether they are referred to or not. All "acts which relate to the same subject," says Lord Mansfield, "notwithstanding some of them have expired or are

"not referred to must be taken to be one system and con-
"strued consistently."

Sedgwick Stat. Law, 250.

Proceeding a degree further we find the law to be that where a comparison between two statutes in *pari materia* shows that there exists a difference *in substance* between a prior statute, *although repealed*, and the new statute on the same subject, there arises the presumption that the change was intentional, and that the omission of the word in the earlier and repealed statute signifies a deliberate intent on the part of the law-makers to exclude all idea conveyed by the words omitted from the new or re-enacted statute. In the amendment, re-enactment or revision of a statute a mere change of phraseology works no change unless it clearly appears that such was the intention of the legislature, nor will the omission of a material word in the amendment, re-enactment or revision of the statute change the law unless such be the evident intent of the legislature, but a *deliberate or material change of expression* must be taken *prima facie* to import *a change of intention*, and where the omission of material parts indicates a change of law effect must be given to such intent.

23d Am. and Eng. Encl. of Law, 372, 373, 374 and numerous cases cited in note.

This court, very recently, in construing various sections of the present bankruptcy act, having this rule of construction in view, held that the omission from the present act of certain provisions referring to the same subject-matter which existed in the Acts of 1841 and 1867, indicated the intention of Congress not to retain those omitted provisions. The court said: "The Bankruptcy Acts of 1867 and 1841,

"as has been seen, each contained a provision conferring, "in the clearest terms, on the Circuit Court and the Dis- "trict courts of the United States concurrent jurisdiction of "suits at law or in equity betwen the assignee in bankruptcy "and an adverse claimant of property of the bankrupt. We "find it impossible to infer that when Congress, in framing "the Act of 1898, entirely omitted any similar provision, "and substituted the restricted provisions of Section 23, "it intended that either of those courts should retain the "jurisdiction which it had under the obsolete provision of "the earlier acts."

Bardes v. *First Natl. Bank of Hawarden*, 178 U. S., 524-537.

In the matter of *Jacob Hirsch*, 96 Fed. Rep., 468-477, District Judge HAMMOND says: "The Act of 1898 does "not use the words: 'in contemplation of insolvency,' a "phrase found in the Act of 1867 and the omission of the "word 'insolvency' is therefore quite significant."

From the principles above stated, we now venture to draw the conclusions applicable to the sections of the present bankruptcy act now under discussion. Compare Section 57*g* "the "claims of creditors who have received preferences shall "not be allowed, unless such creditors shall surrender their "preferences," with the analogous provision in the Bankruptcy Act of 1867 (Rev. Stat., 5084, Section 23), reading: "Any person who * * * has accepted "any preference *having reasonable cause to believe that the "same was made or given by the debtor* contrary to any "provision of the act, March 2, 1869, Chap. 176, * * * "shall not prove the debt or claim on account of which the "preference is given, nor shall he receive any dividend "therefrom until he shall first surrender to the assignee

"the property, money, benefit or advantage received by him "under such preference."

The elision from the Act of 1898 of all that part of Section 5084, making "reasonable cause to believe, that a preference was intended," a bar to the right of a creditor to participate in the estate of the bankrupt is more than "quite significant." A material change in the language of the statute must be presumed to signify what the changed language imports—a changed purpose. Congress certainly had before it this provision of the prior act when it enacted Section 57*g*, and this material change must be taken *prima facie* to import the intention of Congress to change the whole law in this particular. Congress therefore by divorcing intent from the creditors' relation to an act creating a preference did in effect declare that knowledge on the part of the creditor in receiving a payment or transfer, that such payment or transfer was a preference, is no longer necessary. It discarded the requirement of knowledge on the part of the creditor in order to create a payment or transfer a preference. Such being the necessary effect of this change of phraseology, it is the duty of the courts to give effect to this intention.

The omission of intent in the creation of a preference, which would debar a creditor from proving his claim, is also shown by a comparison of Section 60 of the bill, as originally introduced, where intent was made essential to create a preference, with Section 60 of the act as passed, in which only the effect of the act complained of is made the test.

Paragraph 60*a*, before it was finally amended, read:

"Section 60*a*. A person shall be deemed to have "given a preference if, being insolvent or in contemplation

" of insolvency or bankruptcy, he has procured or suffered " a judgment to be entered against himself in favor of any " person, or made a transfer of any of his property *with in-" tent (1) to defeat the operation of this act; or, (2)* to en-" able any one of his creditors to obtain a greater percentage " of his debt than any other of such creditors of the same " class." (Senate bill, 1035.) Section 60*a* as passed reads: " A person shall be deemed to have given a preference if, be-" ing insolvent, he has procured or suffered a judgment to be " entered against himself in favor of any person, or made a " transfer of any of his property, and the effect of the " enforcement of such judgment or transfer will be to en-" able any one of his creditors to obtain a greater percent-" age of his debts than any other of such creditors of the " same class." It appears by a comparison between these two sections that the words " *in contemplation of insolv-" ency or bankruptcy,*" and " *with intent (1) to defeat the " operation of this act; or (2)* " were stricken out of the former paragraph, and the words " and the effect of the " enforcement of such judgment and transfer will be " inserted.

Section 57*g* as first introduced by Senator Lindsay (Senate Bill No. 1035, introduced by Senator Lindsay March 22, 1897), read as follows: " A creditor who has received " a preference *and shall have had reasonable cause to be-" lieve that it was thereby intended by the debtor to give " him a preference* shall not be allowed to prove his claim " unless he shall surrender such preference." In the bill as passed the words in italics do not appear.

" When a former act contains an express exception, and " the first drafts of a later act relating to the same subject " contain the same exception, and this exception is omitted " from the act as finally enacted, and other provisions in

"the act are made to conform with this change, we cannot "but conclude that Congress intended to make the change, "and the courts should not seek to render it nugatory by "a forced construction."

U. S. Circuit Court of Appeals, First Circuit,
Re Marshall Paper Co., 102 Fed. Rep., 872.

Mr. Referee HOTCHKISS (*in re Meyers*, 1 N. B. N., 208), in discussing this phase of the question, said: "It would "be ridiculous to assume that Congress intended to con- "tinue the necessity of showing intent and active agency "as elements of proof in a case like that at bar in the face "of the fact that that body eliminated from a bill before "them the very words which made such proofs necessary."

It is interesting to note the change of heart evidently experienced by Referee Hotchkiss since he wrote the opinion *in re Meyers*. Compare the above utterance with his subsequent opinion *in re Hall*, part of which is incorporated in appellants' brief at page 70.

The foregoing furnishes proof conclusive that the interpretation given by the courts below to these sections is consistent with the intent of the law makers not only by the language of the act itself, but by the action of Congress in the deliberate excision from the old act and from the bills first introduced of all words showing intent.

The construction, moreover, almost uniformly given to these sections of the act is in perfect accord with the spirit and intent of the act.

The cardinal purposes of the Bankrupt Act is (*a*) to procure a rateable distribution of a bankrupt's assets among his creditors; and, (*b*) to discharge the insolvent from his debts.

Wilson v. *Bank, supra.*
Re Scrofford, 4 Dillon, 376.

The effect aimed at by the Bankruptcy Act is naturally the prevention of preferences; the only way in which to secure an equitable distribution of a bankrupt's property among his creditors is to exclude those creditors who have received preferences. After the repeal of the last Bankrupt Act in 1879 and before the present act was placed upon the statute books, the division of an insolvent's assets among a favored few and the giving of preferences to the exclusion and at the cost of other creditors having equally meritorious claims, constituted an evil which in the absence of a bankruptcy law, could not be remedied. In the language of the Supreme Court of Illinois:

"The right to prefer creditors is an infirmity still re-
"maining in the body of the common law. It is contrary to
"the letter and spirit of the maxim that equality is equity.
"It is condemned in all our state insolvent laws. The Fed-
"eral bankrupt laws have never omitted to annex penalties
"to its exercise. It makes our law in relation to voluntary
"assignments a poor, lame piece of legislative work, in-
"tended only for debtors who desire to deal fairly with
"their creditors. It is the result, very often, not of the
"voluntary choice of debtors already weak and discouraged,
"but of persistent and harassing importunities or of flat-
"tering promises which often amount to fraudulent bar-
"gains."

Butler Paper Co. v. *Robbins,* 151 Ill., 588-632.

Despite the general sentiment that where a number of creditors alike extend purely personal credit to the debtor, neither demanding nor receiving security at the time of giving credit, every dictate of justice and fair dealing requires that when the debtor becomes insolvent, creditors standing as they do on the same footing, should share alike in the

distribution of his property. Although it was universally conceded that no condition of the law acted more unjustly or was more demoralizing than one which tolerates preferences, the making of preferences went on. This laxity in the law was injurious to credit, because it ever produced a feeling of insecurity and added to what might be termed the ordinary risks of business an arbitrary hazard. This permissive right allowed by the courts was a strong incentive to fraud, besides resulting in the most wanton waste, because of the incessant and constant struggles for advantage which it promoted. What was styled the "race of diligence," receiving not only the sanction, but the fullest approval of the courts, practically was robbing Peter to pay Paul. It is not to be wondered at, therefore, that Congress awoke from its twenty years' slumber, and realizing that preferences were evils which had to be corrected, enacted a measure, *remedial* in its nature, the main purpose whereof was to compel an insolvent debtor to distribute his estate equally among his creditors. A construction of the various parts of the Bankrupt Act in accord with the views of all of the courts below, is but a step in the direction of attaining the manifest objects and purposes of the act.

Should the construction contended for by appellants prevail, the main purpose of the act would be defeated. An insolvent could practically, on the eve of bankruptcy, under the aegis of the law, divide the bulk of his assets among his favorite creditors, by making payments to them ostensibly in the regular course of business. The bankrupt having thus exercised a *delectus personarum*, the trustee would be absolutely prevented, not only from recovering these payments, in absence of proof of knowledge on the creditor's part, of the debtor's intent to prefer, but he would be obliged to allow them to participate in a distribution of the

bankrupt's effects, in common with such other creditors as had received no part of their claims.

Should, however, the prevailing view be approved by this court, the mischiefs sought to be suppressed by the passage of the Bankrupt Act will be greatly lessened. The act is most remedial in its nature. Remedial statutes being made to supply defects or abridge superfluities in the law, that construction which tends to suppress the mischief or advances the remedy should be favored. In construing a statute of like nature, there must always be kept in view the old law, the mischief and the remedy.

Heydon's Case, 3 Rep., 7*b*.
Plowd., 205.
Co. Litt., 11, 42.
Van Horne v. *Dorance*, 2 Dall., 316.

And courts, within certain prescribed limits, have even declared that that which is within the mischief intended to be remedied is considered within the statute, though not within the letter thereof, and that which is not within the mischief is not within the statute, though within the letter.

Eyston v. *Studd*, 2 Plowd., 464.
State v. *Canton*, 43 Mo., 48.
People v. *Lacombe*, 99 N. Y., 49.
U. S. v. *Freeman*, 3 How. (U. S.), 565.

We here call the court's attention to a patent inconsistency in appellant's brief. It is argued therein, first, that bankrupt acts are *remedial*, and must be liberally construed to effect their objects and purposes. (Appellant's brief, page 7.) But at pages 22 and 23 of appellant's brief counsel base their arguments that the act should receive a strict construction, upon the ground that it is of a *penal nature*. As a

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foundation for this argument they cite *In re* Eggert, 2 N. B. N., 185, in which Mr. Referee Jones has stated "this "section is in the nature of a penal statute, and should be "strictly construed." A reference to this case will show that Mr. Jones was discussing, not Section 57*g* or Section 60*a*, but Section 60*b*. The question involved in that case was whether an assignment of a claim against the City of Milwaukee, made by the bankrupt to a creditor, was received by the creditor with knowledge of the fact that a preference was intended, and, consequently, whether the proceeds of this claim so assigned belonged to the bankrupt estate, or to the creditor to whom the assignment had been made. The trustee maintained that the creditor had received this assignment with knowledge on his part that at the time it was made a preference was intended, and that under *Section 60b* the assignment was voidable. It is upon this ruling of Referee Jones that appellants base their argument that the provisions under discussion are penal and must be strictly construed. The *same Referee*, in construing Section 57*g*, in connection with 60*a* says:

"This section (57) of the act was not intended to im-
"pose a penalty but simply to give creditors who receive
"preference options to keep what they have received and take
"no dividends from the estate, or to surrender their prefer-
"ence and share equally with other creditors in the general
"distribution *In re* Conhaim, 97 Fed. Rep., 923. Equal-
"ity is equity, and I see no reason why one creditor should
"receive more from the estate of a bankrupt than another
"creditor, after the debtor becomes insolvent and within
"four months prior to his bankruptcy."

The case of *Conhaim*, 97 Fed. Rep., 923, referred to in the Referee's opinion, is one of the cases incorporated in the appendix to this brief.

We do not think it necessary to consider seriously the illustrations or the suppositious cases in appellants' brief, tending to show hardships likely in appellants' opinion to ensue should the construction heretofore placed upon the act prevail. We have shown that not only does there exist no reason for departing from the strict letter of the law, but that every dictate of equality and justice sanctions the interpretation we contend for. The Bankrupt Act may work hardships in individual cases, but when courts undertake to make law for "hard cases" they pass out of their proper sphere. Courts cannot undertake to add provisions not found in the statutes for the purpose of preventing an apparent hardship.

Comrs. of Laramie Co. v. *Comrs. of Albany Co.*, 92 U. S., 307-314.
Cooke v. *School District*, 12 Colo., 458.
Cheyenne Co. v. *Bent Co.*, 15 Colo., 320-326.

The illustrations, again, may afford reasons for amending or repealing the act and for that reason may properly be addressed to Congress. But "*Lex ita scripta est,*" and the court should be loth to change the law.

We take exception to the oft-repeated charge made by appellants, that the reading of the act, as construed, works hardships, imposes penalties, and unsettles business. The entire act, in a measure, does unsettle business, in that by an adjudication in bankruptcy a creditor, theretofore considered solvent, evades liabilities to his creditors, and that consequently claims considered as good and valuable assets on the creditors' books turn out to be comparatively worthless. But this affords no reason for an arraignment of the act.

Again, a person who has innocently received a preference, is under no obligation to surrender that which he has re-

ceived. He may retain it, or he may surrender the same and receive his dividend. The question of surrender under 57*g* is entirely voluntary and optional with the creditor, who can determine whether it is worth his while, in view of future dividends, to surrender his preference or not. Nor can it be claimed that the value of the unpaid portion of the credit is unduly unsettled. The debtor being insolvent, the account is not properly entitled to reliance as an asset or basis for future recovery. From the moment of actual insolvency all creditors become entitled to share *pro rata* in the estate because it represents the credit given the insolvent by his creditors and in good morals belongs to them and not to him.

Referee Waite in

Re Knost et al., 1 N. B. N., 403.

And it is certainly not inequitable to require one who has received an undue portion of that estate, no matter if innocently, to surrender that advantage before participating in further distributions of it with those who have not received such preference.

Collier on Bktcy. (1st Ed.), 286.

Briefly, the rulings on these points follow the maxim that "equity delights in equality." We forbear to further discuss this point because it is fully treated of in the cases printed in the appendix.

An excellent illustration of the workings of the sections under discussion on this appeal, is the following from the pen of Harold Remington, Referee:

"Unless we take the point of view taken by the Bank-
"ruptcy Act itself, we cannot, of course, hope to arrive at
"a correct interpretation of its provisions. It casts aside,
"apparently without hesistation, one of the cardinal princi-

"ples of Anglo-Saxon common law, namely, that the law "favors the diligent creditor; and it adopts in its stead "the equitable principle that equality is equity, and that "he that asks equity must do equity. It is as if a company "were invited to sit down to a meagre meal. The common "law says, seize what you can as quickly as you can, even if "nothing is left for the others. Bankruptcy law says, there "is little enough at best, but let all sit down and eat quietly "together, each taking his proper share. Not unfairly stated, "these are the respective attitudes of these two great opposite "systems of jurisprudence that have at different times gov-"erned our commercial and business world."

"Adopting, then, the point of view of the Bankruptcy "Act itself, it appears to be perfectly in accord with the "spirit of the law as well as its letter, to hold, as is held by "the decision of the Circuit Court of Appeals, just men-"tioned, that it makes no difference whether one knowingly "or innocently has received a preference over his fellows; "he must put it back if he would share in the estate."

Counsel for appellants have cited from the speeches of members of the Congress made while this act was under consideration by that body, and urge that this court should give that construction to the act which was contended for in the speeches.

This court has very recently, in conformity with its earlier rulings, declared that what individual senators or representatives have urged in debate, in regard to a proposed bill or resolution, does not furnish a firm ground for its application, nor is it important as explanatory of the grounds upon which the members voted in adopting it.

Maxwell v. *Dow*, 176 U. S., 581-601.

Citing:

U. S. v. *Trans-Missouri Freight Assn.*, 166 U. S., 290.

Dunlap v. *United States*, 173 U. S., 65.

It seems, moreover, that these speeches referred to the bills in the original form in which it was introduced, and before it was amended. As we have shown, *supra*, the bill, as first introduced, made both intent and knowledge essential requirements of a preference. These features are not present in the act as passed.

In answer to appellants' arguments that the construction urged by appellees will tend to disturb business relations and gives undue advantage to the creditor who has, without knowledge of his debtor's insolvency, received payment in full of his claim, we adopt the following remarks of Referee Coles:

"In the present case it is very earnestly urged that the "construction placed upon the statute by the authorities "just cited ought not to be adopted, because such construc- "tion will prove in practice intolerably disturbing to busi- "ness, and will bring about results that are unjust to cred- "itors who have received payments in the ordinary course "of business. I do not believe that the construction put up- "on the statute in the cases mentioned will, in point of fact, "occasion the inconvenient and inequitable results asserted. "Under the terms of the act (Sec. 60*b*) payments received "by a creditor in good faith and without knowledge or rea- "sonable cause to believe that the debtor intended to give "a preference, are absolute, and are not subject to be avoid- "ed by the trustee, against the will of the creditor. If the "law were otherwise, it would no doubt prove a serious "hindrance to business. But in making the creditor secure "with respect to payments received by him innocently and

" without knowledge of the debtor's insolvency, the law has " done all that considerations of policy or convenience seem " to demand. There appears to be no sound reason why a " creditor, who has received an undue proportion of the " insolvent estate, should be permitted to share in the dis- " tribution of the remainder, on a perfect equality with other " creditors who have not been similarly favored. On the " contrary, since the principal end of the Bankruptcy Law " is to effect an even-handed division of the estate among " creditors, it seems most consonant with the cardinal pur- " poses of the act to marshal the assets and distribute the " estate upon the just principle that 'he who asks equity " must do equity.' If a particular creditor has in fact re- " ceived a preference, it is immaterial so far as the conse- " quences to other creditors are concerned, whether he re- " ceived it ignorantly or intentionally. In either case it " results in an inequitable division of the insolvent estate. " The knowledge, intent or other emotions of the preferred " creditor are, in the present instance, entirely unimportant, " the only fact of real importance being the creditor's act " and its effect. The rights of a creditor who has received " a preference are carefully guarded by the statute. If " such creditor has altered his position for the worse in re- " liance upon the preference given him, he is to that extent " excused from making restoration. (Sec. 60*c*.) The right " of election which the statute gives him—to surrender the " preference and prove his claim or to retain the preference " —places him in a position where he can always secure his " ratable proportion of the estate.

" It is further insisted that the construction here given " the statute is unjust and unreasonable because it compels " a creditor who has received a partial payment to surrender " such payment before proving his claim, while a creditor

"who has been paid in full is under no obligation to restore "anything. The fact that these consequences result from "the construction placed upon the statute affords, in my "opinion, no sufficient reason for altering that construction. "All laws are in the nature of a compromise between ab- "stract justice and practical expediency. It is entirely im- "practicable and inexpedient to compel restoration on the "part of a creditor who has been paid in full and who has "accepted such payment without knowledge of his debtor's "insolvency. The transaction is closed and considerations "of policy forbid its being re-opened. For these reasons, "the Bankruptcy Law can not make a division of the estate "that is perfectly equal from the point of view of abstract "justice; but with respect to the property actually in hand "for distribution, and as between the creditors entitled to "share in such distribution, the doctrine here applied works "out the highest equity."

In the matter of Siegel-Hillman Co., Bankrupt, 2 Natl. Banqruptcy News and Reports, 933 (937-938).

The cases incorporated in the appendix to this brief, to which we again refer, fully controvert all other arguments of counsel not specifically treated by us.

Second.

THE COURT WAS POSSESSED OF THE POWER TO REQUIRE APPELLANTS TO REPAY THE DIVIDEND RECEIVED BY THEM IN THE BANKRUPTCY PROCEEDINGS, WITHOUT RESORT TO A SEPARATE SUIT.

The second point presented to this court for determination is the correctness of the ruling of the court below in directing appellants to return and repay to the trustee the divi-

dends theretofore received by them. The facts are as follows: At the first meeting of the creditors in the matter of Frank Brothers, bankrupts, to-wit: on March 17, 1899, appellants duly filed their claim against the bankrupt's estate for the sum of $3,093.98 which claim was at that time, no one objecting, allowed in full; thereafter, on April 28, 1899, a dividend of 15 per cent. was declared upon all claims allowed, including appellants' claim, and appellants thereafter received from the trustees their dividend amounting to $464.10. (Rec., 19.) On May 19, 1899, appellee filed with the referee a petition for a reconsideration and rejection of appellants' claim, and in that petition prayed, among other things, for the return of the dividend paid to appellants. The appellants answered said petition and the issue raised by such petition and answer having come on for hearing before the referee, the referee made an order rejecting and expunging appellants' claim and requiring appellants to repay to the trustee the amount of the dividend so received by them. In this order or decree the referee specifically decides, "that this court (District Court) in this proceeding "has the power and authority to order, require and compel "said claimants to repay to said trustee the amount of the "dividend received by said claimants." (Rec., 12-13.) This order and decree of the referee was affirmed by the District Court, and the judgment of the District Court was affirmed by the Circuit Court of Appeals.

Appellants assign as error, that the District Court had no authority to require them in the proceedings brought by appellee to reconsider and expunge the claim, to repay the dividend in question, and claim that the referee's powers were limited merely to reconsidering and rejecting the claim; that although the act requires a creditor who has received a dividend and whose claim has thereafter

been rejected and expunged, to repay the amount of dividend so received by him from the trustee, the only remedy which the trustee has to recover this dividend is by an independent suit against them. It is our contention, on the other hand, that the District Court has the power, after reconsideration and rejection of the claim on which a dividend has been paid, to require the creditor whose claim has been rejected, to repay the dividend received by him in the same proceedings brought to reconsider and reject the claim, and that the trustee need not resort to such independent suit to obtain relief. This is apparent from the reading of the following provisions of the act:

"Sec. 57. PROOF AND ALLOWANCE OF CLAIMS—*a* Proof "of claims shall consist of a statement under oath, in writ- "ing, signed by a creditor setting forth the claim, the con- "sideration therefor, and whether any, and, if so what, se- "curities are held therefor, and whether any, and, if so "what, payments have been made thereon; and that the "sum claimed is justly owing from the bankrupt to the "creditor."

"*d* Claims which have been duly proved shall be al- "lowed, upon receipt by or upon presentation to the court, "unless objection to their allowance shall be made by par- "ties in interest, or their consideration be continued for "cause by the court upon its own motion.

"*f* Objections to claims shall be heard and determined "as soon as the convenience of the court and the best inter- "ests of the estate and the claimants will permit..

"*k* Claims which have been allowed may be reconsidered "for cause and re-allowed or rejected in whole or in part "according to the equities of the case, before but not after "the estate has been closed.

"*l* *Whenever a claim shall have been reconsidered and* "*rejected* in whole or in part upon which a dividend has "been paid, *the trustee may recover from the creditor the* "*amount of the dividend received upon the claim if rejected* "in whole, or the proportional part thereof if rejected only "in part.

"*n* Claims shall not be proved against a bankrupt es- "tate subsequent to one year after the adjudication,or if they "are liquidated by litigation and the final judgment there- "in is rendered within thirty days before or after the expir- "ation of such time, then within sixty days after the ren- "dition of such judgment, provided, that the right of in- "fants and insane persons without guardians, without no- "tice of the proceedings, may continue six months longer."

Sec. 2. "That the courts of bankruptcy * * * are "hereby invested * * * with such jurisdiction at law "and in equity as will enable them to exercise original juris- "diction in bankruptcy proceedings * * * to (2) re- "consider allowed or disallowed claims (7) cause the es- "tates of bankrupts to be collected, reduced to money and "distributed, and determine controversies in relation there- "to, except as herein otherwise provided. (15) Make such "orders, issue such process and enter such judgments in "addition to those specifically provided for, as may be ne- "cessary for the enforcement of the provisions of this act."

In the first place, it is obvious that under the power conferred by Section 2 (7) the bankruptcy court may determine controversies arising over the reconsideration and rejection of allowed claims, and under subdivision (15) in amplification of such powers may make all orders, issue such process and enter such judgments as may be requisite to make such powers effective. It should be observed that subdivi-

sion (7) clothes the court with power to determine controversies "except as herein otherwise provided." The only limitation found in the act upon this power to determine controversies in relation to bankrupt estates, is contained in Section 23(*b*) (quoted below) which provides that suits by trustees shall be prosecuted only in those courts where the bankrupt might have brought the suit. This court, in construing Section 23(*b*) has held that such suits, unless by consent, must ordinarily be brought in the state courts. (*Bardes* v. *Bank*, 178 U. S., 524.) As we shall show, a proceeding to compel a creditor to refund a dividend received by him, is not a suit in the purview of Section 23 (*b*), and not being within the exception stated in that section, the bankruptcy court may determine the controversy and "make such order, "issue such process and enter such judgment as shall be "necessary to carry with effect the provisions of Section "57*l*," and the order made by the Referee herein requiring appellants to repay the dividend is such order and judgment.

The filing of a claim by a creditor in bankrupt proceedings and the allowance thereof is a judicial proceeding; the creditor stands before the court in the attitude of a plaintiff invoking its jurisdiction, and ample provision is made for adjudication and determination of this claim in the bankruptcy court. Any interested party may file exceptions to the claim and an issue is thereby raised; should no objection to a claim be filed the claim filed is allowed, and should the exceptions to the claim be overruled, the claim is likewise allowed.

This allowance of a claim has all the force and attributes of a judgment with the single distinction that it is a judgment in *rem* only; in fact, the act itself designates such al-

lowance as a judgment, for Section 25 provides, "that ap-
"peals, as in equity cases, may be taken in bankruptcy pro-
"ceedings from the courts of bankruptcy to the Circuit Court
"of Appeals of the United States, and to the Supreme Court
"of the territories in the following cases, to wit: * * *
"(3) From a *judgment* allowing or rejecting a debt or
"claim of $500 or over, such appeals shall be taken within
"ten days after the *judgment* appealed from has been
"rendered and may be heard and determined by the Appel-
"late Court in term or vacation as the case may be."

It should be borne in mind that a creditor is not compelled to prove his claim against a bankrupt estate. It is purely a matter of choice with him, but by proving his claim he voluntarily sumbits to the jurisdiction of the court, and he is in court to all intents and purposes, subject to all the provisions and limitations contained in the act. He knows, or the law presumes that he knows, that the allowance of his claim is subject to its reconsideration and possible rejection in whole or in part, and that in case of such rejection he may be required under Section 56*l* to repay to the trustee a part or whole, as the case may be, of any dividend he may have received. Under Section 60*k* a reconsideration of his claim may be had at any time before the estate is closed. The creditor, therefore, who proves his claim is in every respect a party to the proceedings, subject to the order of the court, and amenable to its processes.

This has been tersely expressed by this court as follows:

"Every person submitting himself to the jurisdiction of
"the bankrupt court in the progress of the cause, for the
"purpose of having his rights in the estate determined,
"*makes himself a party to the suit,* and is bound by what
"is judicially determined in the legitimate course of the
"proceeding. A creditor who offers proof of his claim, and

"demands its allowance, *subjects himself to the dominion "of the court, and must abide the consequences.* His reme- "dies for the purpose of this proof are prescribed by the "law."

Wiswall et al. v. *Campbell et al.*, 93 U. S. Rep., 347 (351).

When a creditor, therefore, after proving his claim, receives a dividend, the payment of this dividend is conditional only, subject to the power of the bankruptcy court to consider and reject his claim, and to order him to refund the dividend so received by him. From the time of the filing of his claim until the final closing of the estate the creditor is in court.

Appellants invoke Section 23*b* of the act providing "that "suits by the trustee shall only be brought or prosecuted in "the courts where the bankrupt whose estate is being admin- "istered by such trustee might have brought or prosecuted "them if proceedings in bankruptcy had not been instituted "unless by consent of proposed defendant," and claim that the trustee's power to recover a dividend received by a creditor is limited by this section, and that proceedings to recover the same shall be in accordance therewith. It is manifest, however, that this section has reference merely to claims by the trustee against third persons, strangers to the bankruptcy procedings. This cannot apply to a creditor who has voluntarily submitted himself to the jurisdiction of the court; he is not such a third person as is contemplated by Section 23*b*.

The effect of the rejection of a claim that has once been allowed, the allowance of the claim being, as we have shown, equivalent to a judgment, is analagous to the result of the reversal on appeal of a judgment which has been paid in full. It is the law that on the reversal of a

judgment the party is to be restored to all things which he lost by the judgment below, and if he has paid money on an execution upon the judgment he will be entitled to judgment of restitution for the sum collected from him. This power to compel *restitution* is inherent in all courts and should be exercised in all proper cases.

Andrews v. *Thum,* 71 Fed., 763.
Emes v. *Stevens,* 26 N. H., 117.
Pangburn v. *Ramsay* (N. Y.), 11 Johnson, 143.
Jones v. *Hacker,* 5 Mass., 264.
Boyett v. *Vaughn,* 86 N. C., 725.
Ming v. *Suggett,* 34 Mo., 364.
Scott v. *Conover,* 10 N. J. L., 61.
Crawford v. *Heft,* 58 Mich., 1.

On account of the novelty of the act no reported case in this country upon the point here presented can be found in the books, but in an English case, ERSKINE, C. J., compelled a creditor who had filed a claim against a bankrupt's estate, to refund a part of the dividend received by him upon the ground that the claim filed by the creditor was excessive. The learned Judge used the following language: "As to the "first question, looking at the payments in question as made "to a creditor whose proof remained on the proceedings, and "therefore payments made *in the administration of a trust;* "and considering the other creditors of bailee as interested "in the restoration of the money to the estate; adopting the "principles that guide courts of equity in the administration "of trust estates, and upon which legatees are made to re-"fund for the benefit of creditors, notwithstanding the lapse "of time, or the negligence of the executor; the court is of "opinion that the respondent can not shelter himself under "the statute of limitations, which in such cases is not al-

"lowed to interfere with the due administration of the trust "estate.

"But as the payments made previous to Greenwood's bank- "ruptcy were made by the assignees in ignorance of a fact; "and the amount at the time of his bankruptcy constituted "a legal debt, which the assignees, by expunging Parker's "proof, might have been proved, and may still be proved "under Greenwood's commission; we are of opinion that as "to those sums, amounting to £2521, 7 s 10 d he is entitled "to the protection of his certificate under the positive en- "actment of the bankrupt laws; and that the order for re- "funding must be confined to the three latter sums, amount- "ing to 129£ 6s 11d the proof therefore must be expunged, "and the sum of 129£ 6s 11d must be refunded."

Ex parte Bolton et al., 1 Deacon & Chitty's Rep., 556-562.

It thus appears that the court compelled the creditor to repay part of the dividend received by him upon the ground that the payments were made in *the administration of a trust*, and the court invokes the general equitable powers of a bankruptcy court, but our present bankruptcy act goes further and expressly provides that dividends paid upon a claim which is afterwards rejected shall be repaid.

For the reasons above set forth the judgment appealed from should be affirmed.

Respectfully submitted.

ELI B. FELSENTHAL,
HERMAN FRANK,
Counsel for Appellee.

In the Matter of the Fort Wayne Electric Corporation, Bankrupt, 99 Fed. Rep., 400.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

October Term, A. D. 1899.

In the matter of the Fort Wayne Electric Corporation Bankrupt.

Columbus Electric Company, Appellant,
vs.
Charles S. Worden, Trustee in Bankruptcy of the Fort Wayne Electric Corporation,

Appeal from the District Court of the United States for the District of Indiana.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

The Columbus Electric Company, the appellant, on the 9th of December, 1898, was the creditor of the Fort Wayne Electric Corporation to the amount of $14,646.08 and on that day received the three notes of the debtor, each bearing date upon that day and being for equal portions of the indebtedness and payable, respectively, in thirty, sixty and ninety days from that date. The first note matured January 11, 1899, and on the 20th of January, 1899, that creditor received from its debtor in part payment of the note the sum of $2,500 in money, and this without the knowledge of the

insolvency of the debtor and without reason to believe the debtor to be insolvent and without reason to believe that any preference was thereby intended by the debtor over other creditors. Afterward, creditors of the Fort Wayne Electric Corporation filed their petition in bankruptcy against that corporation, and on the 25th day of January, 1899, the corporation was duly adjudged a bankrupt. On the 24th day of March, 1899, the appellant filed its claim in such bankruptcy proceedings for the balance of the amount due upon the three promissory notes. The referee certified the question of the allowance of the claim to the District Court sitting in Bankruptcy, which court afterward ordered as follows: "1st. "That if the said Columbus Electric Company shall on or "before thirty days from this date surrender to the trustee "for the benefit of the estate of said bankrupt the sum of "$2,500 so paid January 20, 1899, then the full amount "of said claim at the date of filing the petition in bank- "ruptcy herein, to-wit, the sum of $14,884.56, is allowed "as an unsecured claim, and that said sum is ordered to be "entered upon the books of the trustee as the true sum upon "which to compute dividends. 2d. That if such claimant "shall fail or refuse to repay said sum of $2,500 on or be- "fore thirty days from date hereof the said claim is disal- "lowed and expunged from the list of claims upon the "trustee in this cause." This ruling is brought here for review. The opinion of the court below is reported *In re* Fort Wayne Electric Corporation, 96 Fed., 803.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court:

The question presented is this: Can a creditor, who has within four months of his debtor's bankruptcy innocently received a payment upon his debt, be permitted to prove his debt in the bankruptcy proceeding and to receive from the

estate of the bankrupt a dividend thereon without surrendering the preference received? The question is one purely of statutory law and depends for its solution upon the construction to be given to certain sections of the bankruptcy act. (30 Stat., 541.)

Section 60*a* defines a preference as follows: "A person "shall be deemed to have given a preference if, being in- "solvent, he has procured or suffered a judgment to be en- "tered against himself in favor of any person, or made a "transfer of any of his property, and the effect of the en- "forcement of such judgment or transfer will be to enable "any one of his creditors to obtain a greater percentage of "his debt than any other of such creditors of the same class." Section 60*b* provides that the trustee may recover from the recipient any preference received within four months of the bankruptcy if the latter had reason to believe that a preference was intended. Section 3 defines acts of bankruptcy, one of which is: (2) A transfer, while insolvent, to a creditor of any portion of his property with intent to prefer such creditor. Subdivision *b* of that section provides that an involutary petition in bankruptcy may be maintained for such act of bankruptcy committed within four months before the filing of the petition. Subdivision 25 of Section 1, treating of definitions, provides that the word "transfer," as used in the act, shall "include the sale and every other and "different mode of disposing of or parting with property, "or the possession of property, absolutely or conditionally, "as a payment, pledge, mortgage, gift or security." Section 57, subdivision *g*, provides as follows: "The claims of "creditors who have received preferences shall not be al- "lowed unless such creditors shall surrender their prefer- "ences." It is apparent from these provisions of the law that not all preferences by an insolvent debtor may be avoid-

ed. The Congress has seen proper to provide that the trustee in bankruptcy may recover preferences in the event, only, that the creditor had reasonable cause to believe that a preference was intended. It was not designed to interrupt the usual course of business, or to compel a creditor to pay back that which he had innocently received. This, however, does not conclude the case. When a creditor, who has in fact received a preference, comes into the court of bankruptcy seeking to share with other creditors in the estate of the bankrupt, he must come, if at all, upon the terms and the conditions that the law imposes. It is the fundamental principle of the bankrupt law that "equality is equity." The act seeks to marshal the assets of the bankrupt, recovering all property disposed of by the bankrupt in fraud of the act, and to distribute the fund equally among all the creditors in proportion to the amount of their respective claims. This principle we conceive to be distinctly recognized by section 57*g*. That section takes notice of the fact that a creditor who has been innocently preferred can not be compelled to return that which he has received, but it says to him: While the law will not interfere with you with respect to that which you have received and because you received it innocently, yet, if you come to the court asking that you may share with the other creditors in the remaining estate of the bankrupt, you must surrender the preference which you have received, however innocently, for equality is equity, and he who seeks equity must do equity. The act of preference is condemned by the law, but because you were innocent in the taking of it the law will not disturb your possession of that which you received, but when you ask the aid of the court to give you a further share of the estate, you must be content to place yourself upon an equality with other creditors, and that can only be done by a surrender of the preference which you have received.

We think this the clear intent of the law-giver. We do not need to enter upon a critical examination of the various phrases of the act, or to indulge in an investigation of the technical meaning of the words there used. That has been fully gone over in the opinion of the court below whose decision is here under review and in which, in general, we concur.

This view of the proper construction to be given to section 57*g* finds support in the provisions of section 65*d* which declares that a creditor, who has received through a court of bankruptcy in a foreign country a share of his debt and seeks to prove the balance of that debt in bankruptcy in this country, shall not receive any part of his debt here until the creditors resident here shall first have received a dividend equal to the amount received by that creditor through such foreign proceedings. This goes upon the doctrine of equality among creditors. The courts here had not jurisdiction over the property of the bankrupt in the foreign country. What the creditor there received was legally obtained and adjudged to him as of right. The court here could not take it from him, and yet, in the same view in which we regard section 57*g*, the law declares that such creditor shall not, in the distribution of the estate here, have the benefit of that which he legally received elsewhere, but he must stand upon the footing of equality with creditors here, and they shall first be paid out of the estate here an amount equal to that which such creditor received there. The language of section 57*g* is broad and comprehensive and is not susceptible of the restricted construction sought to be placed upon it, unless the word "preference" should receive a narrow and strained construction. It is urged that the term preference means a transfer of property and not a payment of money. In other words, that an insolvent

debtor, seeking in fraud of the act to prefer in part certain of his creditors, can not so do by transfer to them of his property, but he may sell that property and turn it into money and with impunity pay his creditors with that money, and, although they have received it with guilty knowledge of the intent to prefer and of the insolvency of the debtor, the trustee can not recover it back because it was paid in money and not in property. We think this a narrow view of the law and one that would work incalculable mischief. We are not disposed to place such a construction upon the act if it can in reason be avoided, and we are unwilling to put upon the section what we deem to be a strained construction of a broad term, in view of the mischief which would follow. It may not be denied that there are words and phrases in the act, as pointed out in the case of *In re Piper,* 2 N. B. News, 7, elsewhere unreported, which lend support to the opposite contention, but we think that the general harmony of the act would be marred by the narrow construction sought to be placed upon the phrase "preference." The bankrupt here intended to prefer the appellant in the sense that while insolvent it sought to give an advantage over other creditors. It was received, to be sure, innocently and without knowledge of that intent, but the payment none the less worked a preference. It gave to the appellant an undue advantage over other creditors, and while the act will not permit a recovery by the trustee of the payment because it was received innocently, it none the less remains that the meaning of the act is that if the appellant seek further payment out of the estate of the bankrupt he shall share equally with other creditors with respect to his claim. That can only be accomplished by a surrender of the preference received as a condition of further payment out of the bankrupt estate.

This construction, as we think, works out the highest equity between creditors. It may be difficult to reconcile the various phrases used in the act, but the construction which we place upon the section gives to the language therein employed its natural meaning.

The case of *In re Conhaim*, 97 Fed., 923, reaches the same conclusion.

The order is affirmed.

In the Matter of Fixen, Bankrupt. 102 Fed. Rep., 295.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

In the matter of the Bankruptcy of Fixen & Company.

Edward W. Forgy, Trustee of the Estate of Fixen & Company, Appellant,

vs.

Marshall Field & Company, Appellee.

Appeal from the District Court of the United States for the Southern District of California.

This cause comes before this court upon the alleged error of the District Court for the Southern District of California, sitting as a Court of Bankruptcy, in allowing the claim of Marshall Field & Co. against the estate of Fixen & Co., bankrupt.

It appears that on May 29, 1899, Fixen & Co. were indebted to Marshall Field & Co., appellees herein, in the sum of $745.61, for merchandise sold and delivered to said Fixen & Co. by the appellees, and that on that day the appellees received from Fixen & Co., in the ordinary course of business, the sum of $428.45, on account of said indebtedness, leaving a balance of $317.16 still due the appellees. Shortly thereafter the appellees again sold merchandise to the said Fixen & Co. to the amount of $232.50, making a total indebtedness of $549.66. It has been shown that Fixen & Co.

were insolvents on May 29, 1899, when they made the payment on account to the appellees, and that said payment was made within four months of the filing of the petition in bankruptcy. The court below allowed the claim of appellees, as creditors of the bankrupt, for $549.66. The Trustee of the bankrupt estate, appellant herein, objected to the allowance upon the ground that the bankrupt had, while insolvent, given a preference to the claimant Marshall Field & Co.; by said payment on account; that said claimant had not surrendered any portion of said payment to the bankrupt estate or to the trustee thereof, and the enforcement of said transfer and payment would give to said claimant a greater percentage of its debts than to other creditors of the same class. Upon this contention the Trustee brings the matter to this court, and asks for a reversal of the judgment of the court below.

E. T. Dunning, solicitor for appellant.

Charles Udell, L. L. Shelton and H. G. W. Dinkelspiel, solicitors for appellee.

Before GILBERT, ROSS and MORROW, Circuit Judges.

MORROW, Circuit Judge, delivered the opinion of the court.

The question to be determined in this case is, whether a payment made on account by an insolvent debtor, in the ordinary course of business within four months prior to his adjudication in bankruptcy, where it does not appear that the creditor receiving the payment had reasonable cause to believe that it was intended as a preference, constitutes a preference under the bankrupt act that will prevent the allowance of the creditors' claims for the balance of the account. Section 60 of that act provides (30 Stat., 544):

"*(a)* A person shall be deemed to have given a prefer-

" ence if, being insolvent, he has procured or suffered a judg-
" ment to be entered against himself in favor of any person,
" or made a transfer of any of his property, and the effect
" of the enforcement of such judgment or transfer will be
" to enable any one of the creditors to obtain a greater per-
" centage of his debt than any other of such creditors of the
" same class."

It has been questioned whether a payment of money in the ordinary course of business can be construed a transfer of property. In Section 1 of the same Act, however, the word " transfer " is defined as including " the sale and every other " and different mode of disposing of or parting with property, " or the possession of property, absolutely or conditionally, " as a payment, pledge, mortgage, gift or security." As the word " property " is legally understood to include every class of acquisitions which a man can own or have an interest in, it must certainly cover money, and the payment of money, therefore, by an insolvent to an unsecured creditor within the statutory period, must be considered a transfer of his property, constituting a preference under Section 60*a* of the Act of Bankruptcy, the enforcement of which transfer would allow one creditor to obtain a greater percentage of his debt than any other creditors of the same class.

How is such preference to be dealt with? Subdivision *b* of Section 60 of the same Act provides:

" If a bankrupt shall have given a preference within four
" months before the filing of a petition, or after the filing
" of the petition and before the adjudication, and the person
" receiving it or to be benefited thereby, or his agent acting
" therein, shall have had reasonable cause to believe that it
" was intended thereby to give a preference, it shall be void-
" able by the trustee, and he may recover the property, or its
" value from such person."

It is not contended that the appellees herein believed or had any knowledge that the payment from the bankrupt was intended to give them a preference, or that it would in effect be a preferential transfer. The Trustee could not, therefore, recover upon the ground stated in Subdivision *b*. But the Bankruptcy Act provides, in 57*g* that "the claims of creditors "who have received preferences shall not be allowed un- "less such creditors shall surrender their preferences." The appellees have not surrendered their preferences, yet seek to have their claim allowed for the balance due them from the bankrupt, upon the contention that they received the payment from the bankrupt in good faith, without the knowledge of his insolvency, continued to sell goods to the bankrupt firm in the usual course of business, and that the acceptance of said payment on account should not be held as a preference which would prevent the allowance of their claim.

In the former Bankruptcy Act of 1867 the belief of the creditor as to the intention of the debtor in giving a preference was considered, when the surrender of such preference was required. In Section 23 it was provided:

"Any person who * * * shall have accepted any "preference, having reasonable cause to believe that the "same was made or given by the debtor contrary to any pro- "vision of this act, shall not prove the debt or claim * * * "until he shall have first surrendered to the assignee all prop- "erty, money, benefit or advantage received by him under "such preference."

But in the Act of 1898 Congress omitted from Section 57*g* any reference to cause for belief on the part of the creditor, and stated in concise and unmistakable terms that "the "claims of creditors who have received preference shall not

" be allowed unless such creditors shall surrender their pref-
" erences." It is evident that the purpose or intent of the parties in giving or receiving a preference was not intended to be considered in this section, but the effect of the preference in the benefit or advantage which it would give to one creditor over another. No penalty is imposed on the creditor by the section, but merely an option on the part of a creditor who has received a preference to keep what he has received and take no dividends from the bankrupt estate, or to surrender his preference and share equally with the other creditors in the distribution of the estate. The fundamental principle of the act is the real and effectual equality in the distribution of the bankrupt estate. Lowell, Treatise on the Law of Bankruptcy, p. 43. In the disposition of property among creditors equality is equity. *Bank* v. *Sherman*, 101 U. S., 403, 406. To accomplish the purpose of the statute the court exercises its equitable jurisdiction in dealing with preferences. The right to prefer creditors is an infirmity still remaining in the body of the common law. It is contrary to the letter and spirit of the maxim that equality is equity. *Butler Paper Co.* v. *Robbins*, 151 Ill., 632; 11 Am. & Eng. Enc. of Law, 2d ed., 186. In this view of the scope and purpose of the act, it certainly can not be considered inequitable to require one who has received an undue portion of the estate, no matter if innocently, to surrender that advantage before participating in further distributions of the estate with those who have not received such preferences. *Collier* v. *Bank*, p. 286.

It is urged very earnestly on behalf of the appellee, and by counsel who have appeared as *amici curiae*, that this interpretation of the act will be disastrous to credit, that it will unsettle business, and render mercantile transactions so uncertain and insecure that the country at large will suffer

by it. It is further contended that Congress did not intend by this act to interfere with or disturb the ordinary course of business of the country, and in support of a construction of the statute that will avoid such supposed consequences, numerous authorities are cited, which may be summed up in the rule that "statutes will be construed in the most bene- "ficial way which their language will permit to prevent "absurdity, hardship or injustice." Sutherland on Statutory Construction, Sec. 324. The first observation pertinent to the consideration of this rule is that the province of construction lies wholly within the domain of ambiguity. *Hamilton* v. *Rathbone*, 175 U. S., 414, 421. It must therefore appear that the statute is ambiguous, and thus open to construction. "The considerations of evil and hardship "may properly exert an influence in giving a construction to "a statute when its language is ambiguous or uncertain and "doubtful, but not when it is plain and explicit. The same "may be said of the consideration of convenience, and, in "fact, of any consequences. If the intention is expressed "so plainly as to exclude all controversy, and is one not "controlled or affected by any provision of the Constitution, "it is the law, and courts have no concern with the effects "and consequences; their simple duty is to execute it." Sutherland on Statutory Construction, Sec. 324.

That the bankrupt act is ambiguous and uncertain in many of its provisions cannot be denied. But, we are of the opinion that the particular provisions under consideration are reasonably clear and certain. Section 57*g* provides that the claims of creditors who have received "preference" shall not be allowed unless such creditors shall surrender their "preference." There is no ambiguity in this provision, and no uncertainty as to its purpose. When a creditor presents a *bona fide* claim against the bankrupt estate,

the question to be determined is, has the creditor received a "preference" in his dealings with the bankrupt? If he has, the claim cannot be allowed. If he has not, it must be allowed. Then the question arises, what is the meaning of the word "preference?" If we turn to Section 60*a* we find the word "preference" defined, and it is there declared to mean "a transfer" by the bankrupt "of any of "his property" where the effect of the enforcement of such a "transfer" will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. This definition fits very closely into Section 57*g*, and points out still more distinctly the preferred claims that are disallowed. But to understand accurately the character of the transaction that will amount to a preference, we must look for the meaning of the words "transfer of property." This meaning is found in paragraph 25 of Section 1 of the act, where a "payment" is explicitly made one of the methods of transferring property. With respect to the question under consideration, the statute itself has furnished us with this information: (1) That a payment of money is a transfer of property; (2) a transfer of property by an insolvent debtor, whereby his creditor obtains a greater percentage of his debt than any other creditor of his class, is a preference; (3) a claim of a creditor who has received a preference shall not be allowed, unless such creditor shall surrender his preference. The word "preference," as used in Section 3*a*, paragraph 2, and Section 60*b*, has no other meaning than that declared in Section 60*a*. It is true that in those other sections a preference qualified by certain other conditions produces other consequences, but the consequences clearly follow from the other conditions, and not from any different meaning attached to the word "preference."

It is to be further observed that the construction which the appellees give to Section 57*g* is the same as was given to Section 23 of the Act of March 2, 1867. (14 Stat., 517, 528.) But in that section it was provided that the creditor should not prove his claim if he had accepted a preference "having reasonable cause to believe that the same was made "or given by the debtor" contrary to the provisions of that act, until he had surrendered the preference. This construction would require that the creditor's claim should be allowed under the present act, unless it should be established that the creditor had reasonable cause to believe that the preference was made or given by the debtor contrary to the provisions of the act. To give the act this construction, we must do that which Congress has failed to do, namely, interpolate the qualifying provision of the former act. This we can not do. As was said by the Supreme Court in *Bank* v. *Sherman, supra,* "we can not interpolate what is claimed. "Such a function is beyond the sphere of our power and "duty. It is our business to execute the law as we find it, "and not to make or modify it." But, assuming that this preference to different provisions of the present act and the comparison made with the corresponding provisions of the former act to ascertain the meaning of the statute demonstrates that it is open to construction. What follows? As we have read the act, is its meaning absurd? No such claim is made, and could not be sustained if urged. Does this meaning or interpretation of the act work hardship or injustice? It is claimed that it does, and that by interfering with the ordinary transactions incident to trade upon credit the administration of the law as thus interpreted will destroy the business of the country. This is by no means clear. The creditor is not compelled to surrender a payment made to him on account in the ordinary course of business unless

he has reason to believe that his debtor is insolvent, and that the payment is a preference. If the creditor is innocent in the transaction, he has his option to retain the payment and waive his claim to the balance of the account, or he may surrender the payment and present his claim for the whole account. He will do that which will be to his best interest, and his loss, in any event, will be one of degree. It is a well-known fact that the credit system of trade has its limitations and restrictions adjusted as far as possible to the contingencies of loss by insolvency, and that the possibility of insolvency and its attending loss is a continual factor in the ordinary business of the country which the bankrupt act is expected to adjust and equalize among all creditors of an equitable and just distribution and settlement of the insolvent estate. It would seem, therefore, that instead of destroying business, the interpretation we give to the act will be to the advantage of legitimate credit in placing all creditors as nearly as possible on an equal footing. This view of the statute has been taken in the following cases, in which the question now under consideration has been fully and ably considered:

In re Knost, 1 N. B. N., 403; *in re Cohaim,* 2 N. B. N., 148; *in re Wise,* 2 N. B. N., 151.

In the case of *Columbus Electric Co.* v. *Worden,* 3 A. B. R., 634; 99 Federal, 400, the Circuit Court of Appeals for the Seventh Circuit reaches the same conclusion.

The Fort Wayne Electric Company, being indebted to the Columbus Electric Company, gave three notes covering the indebtedness, maturing upon various dates. After the maturity of the first note the creditor received from the debtor a partial payment thereon, in the regular course of business, and without reasonable cause to believe that the debtor was insolvent, and without an intent to obtain an unlawful pref-

erence. Shortly afterwards involuntary proceedings were instituted against the debtor by other creditors, and it was adjudged bankrupt. The Columbus Electric Company filed its claim for the balance due upon the notes. The District Court ordered that if the said creditor should surrender to the trustee the sum received from the debtor as a partial payment, then the full amount of its claim would be allowed as an unsecured claim; but upon the refusal of the creditor to repay said amount, its claim should be disallowed and expunged from the list of claims upon the trustee. The case was appealed to the United States Circuit Court of Appeals. In expressing the opinion of the court, after discussing the sections of the act herein construed, Judge JENKINS said:

"The bankrupt here intended to prefer the appellant in "the sense that while insolvent it sought to give an advan- "tage over other creditors. It was received, to be sure, in- "nocently and without knowledge of that intent, but the "payment none the less worked a preference. It gave to "the appellant an undue advantage over other creditors, and, "while the act will not permit a recovery by the trustee of "the payment because it was received innocently, it none "the less remains that the meaning of the act is, that if the "appellant seek further payment out of the estate of the "bankrupt, he shall share equally with other creditors with "respect to his claim. That can only be accomplished by "a surrender of the preference received as a condition of "further payment out of the bankrupt estate.

"This construction, as we think, works out the highest "equity between creditors. It may be difficult to reconcile "the various phrases used in the act, but the construction "which we place upon the section gives to the language "therein employed its natural meaning."

This opinion expresses our views upon this subject.

The judgment of the District Court is reversed, and the cause remanded to said court, with directions to disallow the entire claim of Marshall Field & Co., and expunge it from the list of claims against the bankrupt estate.

In the Matter of Conhaim. 97 Fed. Rep., 923.

IN RE CONHAIM. DISTRICT COURT, D. WASHINGTON, N. D.

November 28, 1899.

1. *Bankruptcy—Preferences—Payment of Money.*

Payment of a debt in money is a transfer of property, within the purview of Bankruptcy Act, Section 60*a*, providing that a debtor shall be deemed to have given a preference if, being solvent, he has made a transfer of any property, and the effect of the enforcement of such transfer will be to enable one of his creditors to obtain a greater percentage of his debt than other creditors of the same class.

2. *Same—Proof by Preferred Creditor—Knowledge of Creditor.*

Under Bankruptcy Act, 1898, Section 57*g*, providing that "the claims of creditors who have received preferences shall "not be allowed unless such creditors shall surrender their "preferences," it is immaterial that the creditor did not know, or have cause to believe, that the debtor was insolvent or that he was receiving a preference, if such was actually the fact. This provision is not limited or modified by the distinct provision of Section 60*b*, that preferences shall be voidable by the trustee if the creditor "had reasonable cause "to believe that it was intended to give a preference."

3. *Same—Surrender of Preference.*

Where a creditor, holding four promissory notes of his insolvent debtor, received several payments on account, all within four months before the debtor was adjudged bank-

rupt, and so applied the payments as to extinguish two of the notes, partly satisfy the third, and leave the fourth wholly unpaid, held, that he could not prove the fourth note in the character of an unpreferred creditor, but must surrender all the payments received, as a condition upon being allowed to prove any claim against the estate.

In Bankruptcy. On question certified by referee in bankruptcy.

Brady & Gay, for trustee in bankruptcy.

Piles, Donworth & Howe, for proving creditor.

Hanford, District Judge. This is a case of voluntary bankruptcy, in which the referee has certified to the court for decision a question as to the right of the Washington National Bank to prove against the bankrupt estate, and have allowed debts due to the bank upon two promissory notes, one of which has been partially paid. The trustee contends that the claim of the bank as to both of said promissory notes should be rejected, unless the bank will surrender the amounts of the several payments made by the bankrupt on account of his indebtedness to said bank. The facts of the case are as follows: On January 1, 1899, the bank held four promissory notes given by the bankrupt for loans made to him by the bank. Between January 1 and February 20, 1899, the bankrupt made several payments to the bank on account of his indebtedness on said notes, amounting in the aggregate to $3,150; the last payment being on the 14th day of February. The petition to be adjudged a bankrupt was filed in this court on the 20th day of February, 1899. The payments when made were not applied on all of the four promissory notes, but were so applied as to extinguish two of them, and the surplus was all applied on one of the notes now held by the bank, leaving a small balance unpaid; and

the fourth note, amounting to $1,500, with accrued interest, remains wholly unpaid. At the time the payments were made the bankrupt was in fact insolvent, but there is no evidence tending to prove that the officers of the bank had any reason to suppose that he was in that condition, or that they were receiving a preference over other creditors.

Section 57*g* of the Bankruptcy Act provides that "the "claims of creditors who have received preferences shall not "be allowed, unless such creditors shall surrender their pref- "erences." The attempt is made to avoid the objection to allowance of this claim by insisting that the bank has not received a preference, and in the argument there is an attempt to draw a distinction between preferences given and preferences received; that is to say, when an insolvent debtor disposes of his property so as to benefit one creditor, and knows that his other creditors must suffer a loss, the benefit so given is, as to the debtor, a preference, but, if the creditor who receives it does not happen to know that he is gaining an advantage over other creditors of the same debtor, then, as to him, there is no preference. This appears to me to be, in truth, a hair-splitting argument. It seems to me that, when a preference is given, there is necessarily a preference received. The word "preference," as used in the Bankruptcy Act, must be given its usual and ordinary definition; and it means exactly the same thing, whether connected with the word "given," or with the word "received." This section of the act was not intended to impose a penalty, but merely to give creditors who received preferences options to keep what they have received, and take no dividends from the estate, or to surrender their preferences, and share equally with other creditors in the general distribution. It is the benefit or advantage which one creditor obtains over others, and not the purpose or intent of the parties, which

determines the effect. Section 60*b* provides that in cases of preferences received within four months before filing of a petition, or after the filing, with reasonable cause to believe that it was intended thereby to give a preference, such payment or transfer of property shall be voidable by the trustee, and he may recover the property or its value. This is a distinct provision of the law, and, in my opinion, it does not control the interpretation of Section 57*g*. The law which does govern is found in Section 60*a*, which provides that a preference shall be deemed to have been given when an insolvent person shall have made a transfer of his property, and the effect of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debts than any other of such creditors of the same class. Referring to the first section of the act, we find that a defintion is given to the word "transfer," giving it a comprehensive meaning, including a payment. So it is made clear by the express terms of the statute that in making payments to the Washington National Bank after the petitioner had become insolvent, and leaving other creditors unpaid, the case was brought within the purview of Section 57*g*; and the bank is therefore required to elect whether to account to the trustee for the $3,150 received in payment, and stand upon a plane of equality with other unsecured creditors, or to retain said amount in lieu of any dividends which it would otherwise be entitled to receive from the estate.

The argument that the bank may assume the position of an unpreferred creditor as to the $1,500 promissory note, and retain the payments which were applied on the other notes, is, in my opinion, contrary to the spirit and letter of the statute. The prohibition contained in Section 57*g* is not limited by the terms of the section to the particular debt or chose in action on account of which a preference has been

received, but it refers to creditors who have received preferences, and provides that the claim of such creditors shall not be allowed, unless they shall surrender the preferences received. In the very excellent treatise by Mr. Frank O. Loveland, the following commentary is made upon this section of the statute:

"The language of this provision is much broader than "that contained in the former bankrupt acts. Under the "Act of 1867 such creditors were prohibited from proving "only 'the debt or claim on account of which the preference' "was made. Under that provision the court held that where "a creditor had two disconnected debts, and had received a "fraudulent preference as to one only, he might prove the "other, and receive dividends upon it. It may be doubted, "however, under the present statute, if a creditor who has "received a preference can prove any claim until he has sur-"rendered his preference." Loveland, Bankr., p. 257.

Let an order be entered disallowing the entire claim of the Washington National Bank as to both of the promissory notes mentioned, unless said bank shall elect to surrender to the trustee the entire amount of payments which it has received, and present a new claim for the amount which the bankrupt owed on the 1st day of January, 1899.

In the Matter of Wise, Bankrupt, 2 National Bankruptcy News & Report, 157.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK.

In the matter of James T. Wise, Bankrupt.
In Bankruptcy, No. 1437.

Before ROSWELL R. MOSS, Esq., Referee.

Objections by the trustee and by certain creditors to the allowance of claims of certain other creditors, alleged to have received preferences not surrendered.

A. C. Eustace for the bankrupt and certain creditors.

Robert T. Turner, Herendeen & Mandeville, Frederick Collin, Charles M. Marvin, Boyd McDowell, J. John Hassett, F. A. Williams, respectively, for certain creditors.

OPINION.

At the first hearing of the first meeting of creditors in this matter, many claims of creditors which had been filed with the referee, or which were then presented, were acted upon and allowed. And at different hearings since then, pursuant to adjournments of the first meeting of creditors, other claims have been presented and allowed. At the first hearing one of the claims was presented by the Second National Bank of Elmira, upon a note for $3,400. It appeared that at one time the indebtedness of the bankrupt to the bank was represented by a $4,000 note, upon which a payment of $600 was made within four months prior to the filing of his petition; and the note upon which the claim presented was founded, given for the balance remaining after

such payment. Objection was made at that time, under section 57*g* of the Bankrupt Act, to the allowance of that claim, upon the ground that such payment was, as claimed, a preference. At the different hearings during the first meeting of creditors, it appeared with respect to other claims that payments had been made to the creditors presenting them during the four months prior to the filing of the petition. And different creditors represented by their attorneys have made similar objection to the allowance of those claims. At the first meeting such claims as were objected to were allowed for the purpose of participation in choice of trustee; and the decision of the questions raised by the objections to those claims, as well as by similar objections to claims subsequently presented, has been reserved; the claims having been allowed conditionally and subject to such reservation.

The provision of the Bankrupt Act of 1898 to be especially considered in the determination of the question are those contained in Section 1, defining the term transfer; 3, declaring what transfers are acts of bankruptcy; 60*a*, providing when a person shall be deemed to have given a preference; *b*, when a preference shall be voidable, and the trustee may recover it; and section 57*g*, providing that "the claims of creditors "who have received preferences shall not be allowed unless "such creditors shall surrender their preferences."

In construing and applying these provisions of the present law, provisions of former acts and the judicial interpretation of them may and should be considered. For it is within a rule of statutory construction that a prior act, since repealed, may be considered in arriving at the legislative intent in the subsequent enactment of a statute upon the same subject. Not only is the legislature, where it uses the language of the former statute, may be deemed to have used that lan-

guage according to the judicial construction it underwent, but, if in the enactment of the subsequent statute it is found that provisions have been added to those in the former, or that some of the provisions of the former, particularly if they have been conditional provisions, have been omitted, such conditions and omissions must be taken as significant of the legislative intent in the subsequent enactment. This seems to be elementary, and it is clearly within the reason of the rule of Sedgwick in his treatise on Statutory Construction, at pages 250, 251, quoting Lord Mansfield and Justice Parke.

Referring, first, to the act of 1867, under section 18 no person who had received any preference contrary to the provisions of that act could vote for or be eligible as assignee.

Section 35 provided that a payment or transfer made by a person being insolvent or in contemplation of insolvency within four months before the filing of the petition with a view to giving a preference to any creditor or person having a claim against him, such creditor having reasonable cause to believe him insolvent; or such payment, transfer or conveyance made within six months before the filing of the petition to any person with a view to prevent his property going to his assignee, such transferee then having reasonable cause to believe him insolvent or acting in contemplation of insolvency, the transaction should be void and the assignee might recover the property or the value thereof as assets of the bankrupt.

Section 39, defining acts of bankruptcy upon which involuntary proceedings could be predicated, named, among such acts, the making, while insolvent, or in contemplation of insolvency, any payment, sale, conveyance or transfer with intent to give a preference to one or more of his creditors,

and that if such person should be adjudged a bankrupt the assignee might recover back the money or other property so paid or transferred contrary to that act, providing the person receiving it had reasonable cause to believe the debtor was insolvent, and that such creditor should not be allowed to prove his debt in bankruptcy. Section 19 provided what classes of debts were provable; and, under section 20, a debt secured by a mortgage or pledge of real or personal property could be proved for the balance after deducting the value of such property, or the security could be released and the whole debt proved; the section containing a provision for determining the value of the security by sale, and providing, further, that if the property was not so sold or released and delivered up, the creditors should not be allowed to prove any part of his debt. And under section 23 it was provided that any person who should have accepted any preference having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of that act, should not prove the debt or claim on account of which the preference was made or given, nor should he receive any dividend therefor until he should first have surrendered to the assignee all property, money, benefit or advantage received by him under such preference.

Turning, now, to the act of 1898, section 1 (25) defines transfer, as used by the act, to include the sale and every other and different mode of disposing or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security. Among the acts of bankruptcy which may be the foundation for involuntary proceedings, defined by section 3, are transfers by an insolvent of any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors. Section 60*a* declares that a person

shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property and the effect of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any of such creditors of the same class. Section 60*b* provides that if a bankrupt shall have given a preference within four months before the filing of a petition, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by that trustee and he may recover the property or its value from such person.

Section 57, making provision for proof of claim by statements in writing under oath and for their allowance after being so proved, and that claims of secured creditors may be allowed to enable them to participate in the proceedings of meetings held prior to the determination of the value of their securities, but especially allowed for such sums only as seem to be owing over and above the value of the securities, and permitting the hearing and determination of objections to claims as soon as the convenience of the court permits, declares in clause *g*, that "The claims of creditors "whom have received preferences shall not be allowed un- "less such creditors shall surrender their preferences."

Many words and terms used in the Act of 1867 needed and underwent judicial interpretation and definition. The Act of 1898 in the first section, gives statutory definitions to many such words used in it. And insolvency as used in the Act of 1898 has a very different definition to that which the court gave it as used in the Act of 1867. The term preference is not defined in section 1, but I think the provisions of section 60*a* are a definition of that term wherever used in the act. So that, if the effect of a transfer, which

by Section 1 includes a payment, made by an insolvent, who, as defined by the act, is one whose property at a fair valuation is less than his debts, is to enable one creditor to obtain a greater percentage of his debt than others, the transfer is a preference without regard to the intent with which it was made or received. To be an act of bankruptcy under Section 3, it must have been made with intent to prefer such creditor over other creditors. And under Section 60*b*, to enable the trustee to avoid it and recover it back, the person receiving it or to be benefited thereby or his agent acting therein, must have had reasonable cause to believe that it was intended as a preference. But I do not find anything in the plain language of Section 57*g* limiting its prohibition of the allowance of claims of creditors who have received preferences, unless such preferences be surrendered, to preferences which have been received with knowledge or reason to believe the preference was intended. And the fact that the Act of 1867 in Section 23 contained such provision makes its omission in Section 57*g* of the present act, significant of the legislative intent to make its provisions applicable to all preferences as they are defined by Section 60*a*. The foregoing comparison of the language of the two acts, leads to the conclusion that any payment made by an insolvent working a preference, needs to be surrendered by the creditor before a claim proved by him can be allowed. This conclusion is all the more irresistible because contrary to my impression formed when the objections to the allowance of the claims of creditors who had received payments were interposed in this case. And this conclusion finds support in the opinion of Referee Waite in the matter of Knost & Wilhemy (1 Nat. Bankruptcy News, 403). I would be disposed to follow such a prior decision by another referee in the absence of a controlling

decision to the contrary by a higher court, and would not attempt to overrule it unless I could give more satisfactory reasons. But the opinion of Referee Waite in that case is so thorough and his reasoning so logical and forceful, as to convince me of the correctness of its result so far as it defines Section 57*g* of the present act. And the same decision is reported to have been made by the referee at Dallas, Texas, in the matter of *Scott*, 1 National Bankruptcy News, 226.

A more extended reference to and consideration of the decisions under the Act of 1867 than is presented by the opinion in the matter of *Knost & Wilhemy*, leads to the same result. The multitude of cases under that act which consider the question of the effect upon the proof and allowance of claims of preferences and securities is too great to refer to them all, or to attempt even a generalization of their holdings. Reconciliation of their differences is not necessary here. In brief, it may be said that, as the provisions of that act were being construed by the courts, it came to be held that the first clause of Section 35, and its four months limitation of time referred to transfers to creditors, while the second clause and its six months limitation referred to transfers to other parties; that the provisions in Section 39 as to transfers were with reference to involuntary proceedings, and that the general provision at the close of that section giving to an assignee the right to recover a preference made to a creditor, was within the four months limitation of Section 35; and that the provisions of Section 23, prohibiting allowance of claims except upon surrender of preferences, was within the four months limitation of either Section 35 or 39. (*Re Butler, Ex parte Mendel*, 1 Lowell, 506; 4 B. R., 302; Fed. Cas., 9418; *Collins* v. *Gray*, 8 Blatchf., 483; 4 B. R., 631; Fed. Cas., 3013; *Bean*. v.

Brookmire, 4 B. R., 196; Fed. Cas., 1163; *re Richter,* 4 B. R., 221; Fed. Cas., 11803; *re Davidson,* 3 B. R., 418; Fed. Cas., 3599; *re Kipp,* 4 B. R., 593; Fed. Cas., 7376; *Haskell* v. *Ingalls,* 5 B. R., 205; Fed. Cas., 6193; *Sawyer* v. *Turpin,* 2 Lowell, 29; 5 B. R., 339; Fed. Cas., 12410; *re Forsyth,* 7 B. R., 174; Fed. Cas., 4948; *Bingham* v. *Richmond,* 6 B. R., 127; Fed. Cas., 1415; *Tiffany* v. *Lucas,* 15 Wall., 410; *Hall* v. *Wager,* 5 B. R., 181; Fed. Cas., 5951; *Wager* v. *Hall,* 16 Wall., 584. *Hubbard* v. *Allaire Works,* 7 Blatchf., 284; 4 B. R., 623; Fed. Cas., 6814).

Many other cases might be cited to the same effect. A few of which are referred to below on another question.

Referee Waite, in his opinion in the matter of *Knost & Wilhemy,* did not refer to Section 18 of the Act of 1867; and I have not overlooked its apparent similarity to Section 57*g* of the present act. Under that section a preference which worked inelegibility in voting for or being an assignee was dependent upon its being contrary to the act and not limited in terms to its being received with knowledge of its intent. But to have been contrary to the provisions of that act it would seem that a preference must have been given in view of insolvency or contemplated bankruptcy. While, it has been seen, a transfer under the present act may be a preference, though not intended as such. And I find no decisions under Section 18 of the Act of 1867 which considered its omission of any provision as to the knowledge with which the preference was received. But I find one case in which it was held that creditors who had received composition under involuntary proceedings were not entitled after a subsequent adjudication upon petition of creditors not included in the composition, to vote for the assignee, although the court held that the payments in composition were not such

as could be disturbed or recovered back. (*Ex parte Hamline, in re Brodt,* 16 B. R., 320; Fed. Cas., 5993.)

Collier, in his excellent work on bankruptcy, anticipating decisions under Section 57*g*, expressing the view that it includes preferences which could not be alleged as acts of bankruptcy, and although they could not be invalidated, suggests that they are not subject to the limitations of four months found in other sections, although the court might hold that on grounds of public policy preferences received more than four months prior to the filing of a petition need not be surrendered. (Collier on Bankruptcy, 285-286.) I do not think that the doctrine of public policy need be resorted to to find that limitation, although it would have much force if necessary. The provision of Section 39 of the Act of 1867, prohibiting the proof of claims by creditors who had not surrendered preferences, although general and without expressed limitation, was held to be subject to the four months limitation of Section 35. On this subject it was held by the Circuit Court in this district, Judge Woodruff writing the opinion, that although a petition could be filed within six months after the giving of a preference which constituted an act of bankruptcy under Section 39, the preference could not be recovered back unless it was within the four months limitation of Section 35, although the right of recovery, given by Section 39 was general and contained no time limitation. And he said that the concluding sentence of Section 39 would be found to be general and without a time limitation, was to be read and understood with reference to the previous provisions of the act and to be construed in the particular question in that case just as if it would if the words "Subject to the limitations "and provisions of the 35th section" had been added thereto or inserted therein. (*Collins* v. *Gray, supra.*) In

Mayer v. *Helman* (91 U. S., 501) the Supreme Court limited the purpose and scope of the Act of 1867 to the periods limited by some of its provisions, Mr. Justice FIELDS saying: "The great object of the Bankruptcy "Act, so far as creditors are concerned, is to secure equality "of distribution among them of the property of the bank- "rupt. For that purpose it sets aside all transactions had "within a prescribed period. * * * It reaches to pro- "ceedings of every form and kind undertaking or exacted "within that period. * * * That period is four "months for some transactions and six months for others. "These periods constitute the limitation within which the "transactions will be examined and annulled conflicting "with the provisions of the Bankrupt Act. * * * There "is sound policy in prescribing a limitation of this kind. * * * " In all the provisions of the present act in which a period of limitation, prior to the filing of the petition is expressed, that period is four months, and I think the general policy of the act to be ascertained from all its provisions is that that is the limitation of time to which proceedings in bankruptcy strictly so called, and with reference to transactions examined in them extend back prior to the filing of the petition. The period of four months fixed by the act is a statutory limitation of such legal and statutory remedies under it, as an adjudication of involuntary bankruptcy; the condemnation of conveyances as fraudulent within its declarations; for determining what preferences received with knowledge may be recovered from a creditor by a trustee. And while the provision of Section 67*g* prohibiting allowance of claims without surrender of preferences is silent as to the time within which such preferences must have been received, that provision being with respect to the distribution of a fund in equity, a remedy

to be administered according to equity by a court, which the act has clothed with jurisdiction in equity, it is only following precedents set by all equity tribunals to adopt as a limitation of that remedy the statutory or legal rule of four months expressed in the other provisions of the act. It is an old rule and practice in equity which adopts statutory periods of limitations in refusal of remedies for lapse of time. In the reign of Charles II twenty years was considered to be a fit time within which a mortgage was to be redeemable. In imitation of the statute of limitations in real actions so early were the statutes of limitations admitted to be the rule of decision in equity, as well as at law; and though the courts of equity were not within the words of the statutes, the time presented by them was adopted by analogy as a fit and just period for a bar in equity of analogous claims. (Per Chancellor Kent, *Kane* v. *Bloodgood*, 7 Johns, Ch., 90, 113; Pomeroy's Eq. Jur., Sec., 419.)

It is not all payments made by a debtor, subsequently adjudged a bankrupt within the four months' period, which are to be held preferences. To be that, under Section 60*a*, they must have been made while he was insolvent. In this case, upon the facts which have appeared in the examination of the bankrupt and other proof before me, I must find as a fact that the bankrupt was insolvent during all the four months prior to the filing of this petition. Such a finding is consistent with his ignorance of the fact and of his honest belief to the contrary. Nor is it every payment by an insolvent which is a preference under the act. Unless the debtor be adjudged a bankrupt they do not come under the purview of the act, nor under the scrutiny of proceedings in bankruptcy.

I conclude then, that payments made by this bankrupt to his creditors within four months before filing his petition

are preferences, needing to be surrendered before their claims can be allowed. In the case of *Hall* v. *Wager, supra,* it was held that the purpose of the Act of 1867 being to enforce the equal distribution of the estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption permissible by the well settled rules of law to secure the full benefit of that cardinal principle. In the opinion it was said, "The preferences declared void by the "second section of the Act of 1841 were such as were made "by a party contemplating becoming a bankrupt under the "act. There the intent of the debtor was the principal "question. Under the present act a preference created by "a party 'being insolvent' is made void and his intent or "belief is not a question. The fact of insolvency being es- "tablished or admitted the preference ordinarily as to the "debtor is presumed to be void—the presumption being "strong or slight according to the circumstances of each case. "But I can not see that the fact that the debtor knew or "did not know of his insolvency at the time of creating the "preference has much to do in determining the questions as "to him. The purpose of the act being to enforce the equal "distribution of an insolvent's estate, every act of an in- "solvent that tends to defeat that purpose should be con- "strued strictly as against him, and courts should indulge "every presumption that is permissible according to well "settled rules of law to secure the full benefit of this cardinal "principle of law. I would not go so far as to prevent the "exercise of a reasonable *bona fide* effort on the part of an "energetic and hopeful debtor struggling with an honest in- "tent to pay all his debts. For it is often the case that a "trader may be embarrassed and unable to pay his debts "as they mature, but by the exercise of judgment and unre-

" served frankness with his creditors, goes through, pays all, " and converts what was almost a calamity into a profitable " enterprise. But to allow every embarrassed creditor to " thus go on and sustain his acts because he thought he could " go through, and hold as valid all payments and securities, " would be to defeat altogether the object and provisions of " the Bankrupt Act." The Supreme Court affirmed this case on appeal, Mr. Justice CLIFFORD, in delivering the opinion, saying that three things must be proved in order to bring the transaction within the prohibition of the Act of 1867. 1. That the preference was made within four months before filing the petition. 2. That the person giving the preference was insolvent or in contemplation of insolvency at the time the preference was made. 3. That the person benefitted had reasonable cause to believe that the one making the preference was insolvent when the preference was secured and that it was made in fraud of the Bankrupt Act. We have seen that under the present act, knowledge on the part of the creditor is not necessary to bring the preference within the provisions of Section 57*g*. In *Tiffany* v. *Lucas, supra,* it was said that it was for the interest of the community that every one should continue his business, and avoid, if possible, going into bankruptcy. And that that result could not be obtained if the privilege were denied a person who was unable to command ready money to meet his debts as they fell due, to make sales of his property which, if he should fail, notwithstanding all his efforts in keeping out of bankruptcy, such sales being made within six months of that event, would be subject to examination. In the matter of Scott, *supra*, it was said, " The main purpose of the " Bankrupt Act is to take the bankrupt's property into the " custody of the law, and distribute it equally in just pro- " portions among all his creditors. Preferences are the con-

"spicuous frauds in the sense of a bankrupt system, which "the law aims to suppress; and just so far as it fails in this, "it fails to justify its existence, while, on the contrary, so "far as it accomplishes this object it commends itself to all "fair-minded men and contributes essentially to promote the "business interests of the community. But creditors are "quite zealous in seeking preferences; quite as urgent in "demanding them, as debtors are to offer or to yield them; "and the law which aims to prevent that must apply its re- "straints upon both. There is, indeed, greater reason for "applying these restraints to creditors than there is to debt- "ors. The motives which actuate debtors to give prefer- "ences are, almost always, more excusable than those which, "under uniform bankrupt system, induce creditors to demand "them; and it is unjust to visit upon an embarrassed debtor "the penalty for giving a preference, and allowing the press- "ing creditor to escape the penalty for the participation in "the same transaction, for without the concurrence of both "debtor and creditor, a preference is impossible. The pen- "alty to the debtor is the deprivation of his right to a dis- "charge (under the Act of 1867). For him there is no "atonement. The penalty to the creditor should be exclu- "sion from participation in the distribution of the bank- "rupt's estate." Judge DILLON, in writing the opinion in the matter of Richter, *supra*, said *inter alia*, "The cardinal "idea of a bankrupt act is an indiscriminating distribution "of all of the effects of the debtor to all of his creditors.

"This legislation is essentially founded upon the doctrine "that equality is equity. When a debtor finds himself em- "barrassed experience has shown that there arises in his "mind a strong temptation either to conceal his property "or to distribute it as his favor or his enmity or both may "dictate. * * * Recognizing the essential equality of

" right of all the creditors of a common debtor and the duty " of the latter, if he can not pay all in full to pay all " in equal proportions, and the practical impossibility " of accomplishing full and equal distribution without string- " ent provisions, the Bankrupt Act prohibits the debtor " from making and the creditor * * * from accepting " any preference, in money or property, directly or in- " directly, absolutely or conditionally, which contra- " venes the policy or has the effect to defeat the pur- " poses of the act." In *Gibson* v. *Warden* (14 Wall., 249) Mr. Justice MILLER said that the acts mentioned in Section 35 of the Act of 1867 were " not such as were forbidden by " the common law, or generally by the statute of the states. " Nor are they acts which in their essential nature are im- " moral or dishonest. For a man who is insolvent, or ap- " proaching insolvency, to pay a just debt, is not morally " wrong, nor was it forbidden by any law in this country " previous to the Bankrupt Act. And though a preference " of creditors by transfer or assignment of property by an " insolvent may sometimes be given other creditors, it was " not forbidden by the common law and is not forbidden by " many of the states. It is very certain that such a prefer- " ence may consist with the highest obligations of morality " and under the circumstances which anyone can imagine " it may be the dictate of the purest justice in reference to " all concerned. The careful and diligent framers of the " Bankrupt Act were fully aware of all that has been said. " But they were about to frame a system of laws one main " feature of which was to provide for the distribution of " the property of an insolvent among his creditors, and they " adopted wisely, as the general and prevailing rule of dis- " tribution, equality among creditors. But they found that " this general principle could not without hardship be made

"of universal application. When a creditor has obtained "by fair means a lien upon any property of the bankrupt, "that lien ought to be respected. If he had so obtained pay- "ment of the whole or a part of his debt, the payment ought "to stand. These exceptions to the general rule of distri- "bution were, however, liable to be abused, and might be "used to defeat the purposes of the bankrupt law. The "bankrupt, knowing that he must soon be helpless, would "desire to pay or secure favored creditors. They knowing his "liability to pay, and his liability to be called into a bank- "rupt court, would naturally desire to secure themselves at "the expense of other creditors. In this dilemma Congress "said we can not prescribe any rule by which a preference "would be held to be morally right or wrong; and it would "be fatal to the administration of the law of distribution to "permit such a question to be raised. We will therefore "adopt a conventional rule to determine the validity of these "preferences. In all cases where an insolvent pays or se- "cures a creditor to the exclusion of others, and that cred- "itor is aware that he is so when he received it (again it "is to be noted that this is an expression under the Act of "1867) he shall run the risk of the debtor's continuance in "business for four months. If the law which requires equal "distribution is not called into action for four months, the "transaction, if otherwise honest, shall stand; but if by the "debtor himself, or any of his creditors, that law is invoked "within four months, the transaction shall not stand, but "the money or property received by the party shall become "a part of the common fund for distribution." In *Buchanan* v. *Smith* (16 Wall, 277, 301) it was said: "Equal "distribution of the property, *pro rata,* is the main purpose "which the bankrupt act seeks to accomplish." Mr. Justice Field, considering Section 35 of the Act of 1867, applied

the facts of that case, and the meaning of insolvency, intent to prefer and reason to believe, as used in that act, said, in *Toof* v. *Martin* (13 Wall., 40, 51): "The act of Congress "was designed to secure an equal distribution of the prop- "erty of an insolvent debtor among his creditors, and any "transfer made with the view to secure the property or any "part of it, to one, and thus prevent such equal distribution, "is a transfer in fraud of the act." And in *Collins* v. *Gray, supra,* with reference to the intention of the Act of 1867 to disallow preferences given to favored creditors, but not to go further than to avoid such as were given within four months before the filing of the petition, it is said that that bankrupt act aimed "at an equal distribution of all the prop- "erty of a debtor among his creditors, from the time he be- "comes insolvent * * * provided, of course, he be "adjudicated a bankrupt,as was said in *Gibson* v. *Warden, supra.*"

These expressions of the purpose of a bankrupt system being the equal distribution of an insolvent's estate among his creditors are applicable to the Act of 1898.

Interpreted by them the purpose of the act is found to be the considering of an insolvent's estate as a fund in equity for equal distribution *pro rata* among his creditors, if he be adjudged a bankrupt. It is consistent with that purpose to permit preferential payments to be retained by a creditor, not receiving them with knowledge, so long as he asks no part of the fund. But if he comes into court asking distribution he should do equity, and the preference he has received, whether he knew it was intended as such or not, should be treated as part of the fund for distribution; and I am persuaded that Section 57*g*, under that interpretation, better promotes equality among creditors than did the anala-

gous provisions of the Act of 1867, which required surrender as a condition to the right of distribution only from such creditors as received with knowledge.

Under Section 57*c* of the act the proof and allowance of claims are distinct. Strictly, the proof is the sworn statement by which a creditor presents a claim, and it should conform to the requirements of the acts and General Order XXI of the Supreme Court. The allowance of a claim is the judicial action by which it is established in the proceeding and permitted to participate in distribution. This is the chief purpose of the allowance, although claims may, under the act, be allowed conditionally or temporarily for such purposes as participating in choice of trustees, where some question may remain to be determined before they can be allowed for the purpose of distribution. As, for example, a secured claim may be allowed for the apparent amount of the claim over the value of the security, the exact value of such security being left for future determination under the act, before the amount is ascertained for which the claim is to be allowed for the purpose of distribution. From this it is to be seen that the chief purpose of the allowance of the claim, after it has been proved, is to determine the amount at which it shall participate with other claims in the distribution of assets. Therefore, the chief purpose of Section 57*g*, which by its terms prohibits the allowance of a claim to a creditor who has received a preference, unless he shall surrender his preference, is a prohibition of his receiving a distributive share from the assets without the surrender of any preference which he may have received. And the prohibition of allowance without surrender is in effect a prohibition of the distribution upon claims, upon which preferential payments have been made without their surrender by repayment to the trustee, or what in effect works the same

result, the crediting of them upon the distributive share to which the creditors would be entitled, if the preferences had not been made. Such a disposition of the claim produces equality *pro rata,* and equality is equity. It does not interfere with transactions during the four months which were closed, nor with transactions the payments on which exceed the dividend obtainable by distribution in bankruptcy, for those can be recovered back only under section 60*b* and to such a recovery, knowledge or reason to believe the transfer was intended as a preference is necessary.